

(24,369)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 625.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO,
APPELLANT,

vs.

PAUL I. WELLES, JOHN DANIEL, TRUSTEE OF METROPOLIS CONSTRUCTION COMPANY, BANKRUPT, AND THOMAS F. BOYLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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No. 2273

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL I. WELLES and JOHN DANIEL, Trustee of
METROPOLIS CONSTRUCTION COMPANY, a
Corporation, Bankrupt,

Appellants,

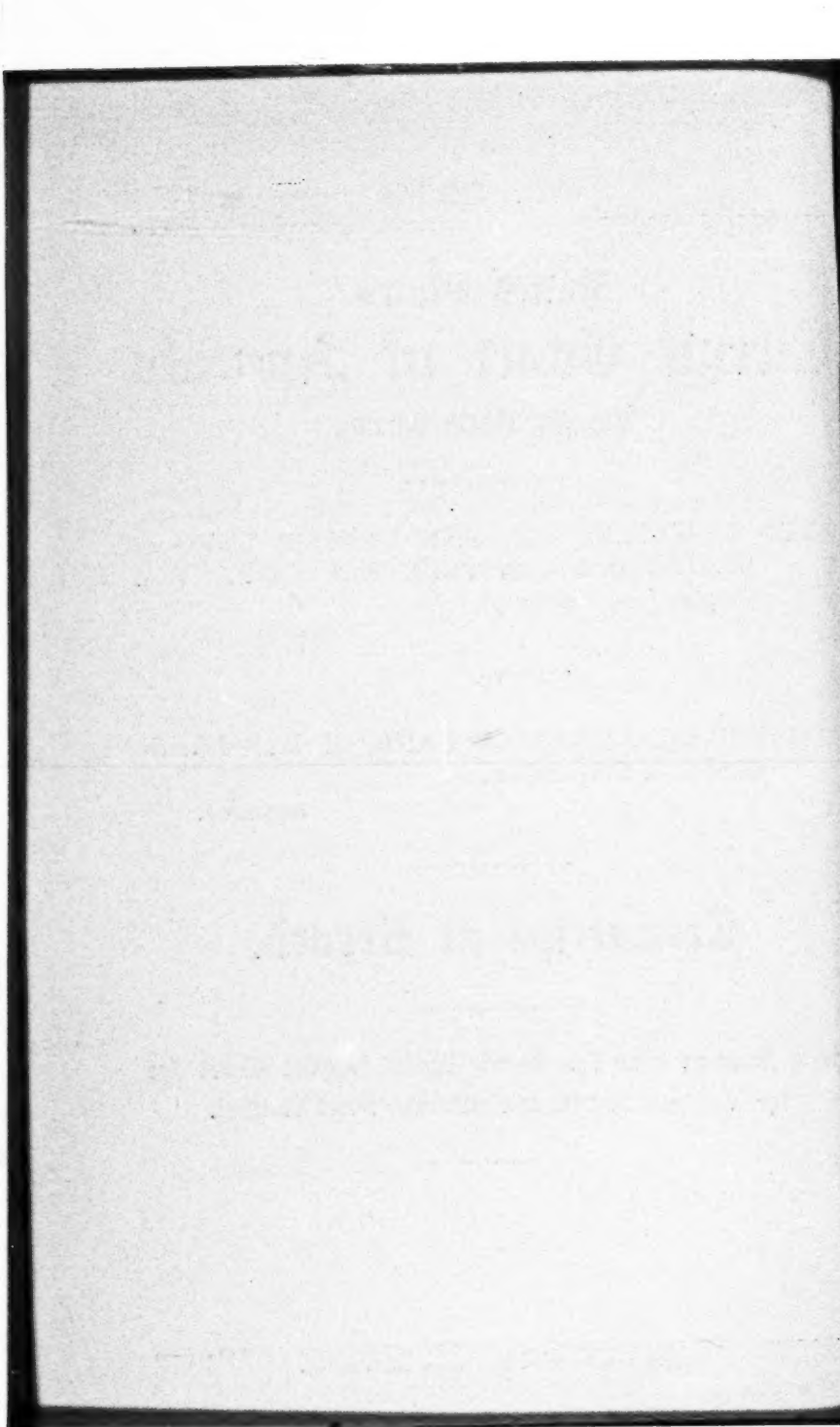
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-
CISCO, a Corporation,

Appellee.

Transcript of Record.

Upon Appeals from the United States District Court for
the Northern District of California, First Division.



Names and Addresses of Attorneys of Record.

C. A. S. FROST, Humboldt Bank Building, San Francisco, California,

Counsel for Appellant Paul I. Welles.

A. F. MORRISON, **P. F. DUNNE** and **W. I. BROBECK**, Crocker Building, San Francisco, California; **GAVIN McNAB**, Merchants National Bank Building, San Francisco, California; **B. M. AIKINS**, Metropolis Bank Building, San Francisco, California, and **MILTON J. GREEN**, Mills Building, San Francisco, California,

Counsel for Appellant John Daniel, Trustee, etc.

KNIGHT & HEGGERTY, Crocker Building, San Francisco, California; **JAMES B. FEEHAN**, Humboldt Bank Building, San Francisco, California, and **JOSEPH W. BERETTA**, Humboldt Bank Building, San Francisco, California, Counsel for Appellee.

*In the District Court of the United States, in and for
the Northern District of California.*

No. 15,148.

PAUL I. WELLES,

Complainant,

vs.

JOHN DANIEL, Trustee of the Estate of **METROPOLIS CONSTRUCTION COM-**

PANY, a Corporation, Bankrupt, PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, and THOMAS F. BOYLE,

Defendants.

Praeceptum [for Transcript of Record].

To the Clerk:

You are requested to make a Transcript of Record, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal granted in the above-entitled cause, and to include in said Transcript of Record the following papers and exhibits:

1911.

April 18. Bill of Complaint.

" 19. Order to Show Cause.

May 24. Amendments to Bill of Complaint.

June 20. Return of Portuguese-American Bank.

" 27. Amended Return of Portuguese-American Bank.

July 3. Exceptions to Amended Return of Portuguese-American Bank.

" 3. Amended Return and Answer of Thomas F. Boyle. [1*]

1911.

July 11. Order Case Referred to A. B. Kreft, etc.

" 11. Replication of Complainant to Answer of Thomas F. Boyle.

1911.

Sept. 5. Answer of John Daniel, Trustee, etc.

Oct. 6. Answer of Portuguese-American Bank.

*Page-number appearing at foot of page of original certified Record.

- Oct. 14. Report of Referee.
Statement of Evidence Taken Before
Referee (filed herewith and to be set-
tled).
- “ 16. Replication of Paul I. Welles to Answer
of Portuguese-American Bank.
- “ 25. Replication of Paul I. Welles to Answer
of John Daniel.
- Dec. 12. Order Complainant Entitled to Relief
Demanded.
- “ 13. Order Approving Report.
- “ 18. Writ of Injunction and Return.
- “ 26. Order Case Referred to A. B. Kreft.
- 1912.
- Mch. 8. Report on Reference.
- Apl. 15. Order Cause Referred to A. B. Kreft.
- “ 15. Amendment to Prayer of Bill.
- “ 15. Order Allowing Amendment to Prayer
of Bill.
- July 16. Report of Special Referee.
- Aug. 14. Exceptions of Paul I. Welles.
- “ 16. Exceptions of John Daniel.
- Sept. 4. Order Submitting Report and Excep-
tions in Briefs. [2]
- 1912.
- Dec. 19. Order Submission Set Aside and Cause
Restored to Calendar.
- 1913.
- Jan. 18. Order Cause Submitted on Briefs on File.
- “ 18. Opinion Confirming Report of Referee.
- “ 18. Order Report Confirmed in Favor of
Portuguese-American Bank.

Jan. 30. Decree.

Feb. 4. Notice of Petition for Severance.

" 4. Petition for Appeal of John Daniel,
Trustee.

" 4. Assignment of Errors of John Daniel,
Trustee.

1913.

Feb. 8. Petition of Paul I. Welles for Appeal.

" 8. Assignment of Errors of Paul I. Welles.

" 8. Consent of Paul I. Welles to Unite in
Appeal.

" 10. Order Granting Appeal, Severance, and
Allowing Supersedeas.

" 13. Bond of Complainant on Appeal, with
Order Approving Same,

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant
and Appellant. [3]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant and
Appellant.

Receipt of a copy of the within Praecepte this 20th day of February, 1913, is admitted.

**JAMES B. FEEHAN,
KNIGHT & HEGGERTY,**

Attorneys for Defendant Portuguese-American Bank.

EDWARD F. MORAN,
Attorney for Defendant Thomas F. Boyle.

Filed Feb. 21, 1913. [4]

[Title of Court and Cause.]

Supplemental Praecepte [for Transcript of Record].

To the Clerk:

You are requested to include in the Transcript of Record, made by you, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the Appeal granted in the above-entitled cause, the following papers:

May 1, 1911. Return of United States Marshal on Order to Show Cause.

July 11, 1911. Order Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.

December 13, 1911. Order Granting Complainant Injunction *pendente lite*, etc.

December 26, 1911. Minute Order, Referring Cause to Referee upon the Issues Arising upon the Pleadings.

April 15, 1912. Order Referring Cause to Special Referee and Examiner to Report on Testimony Taken, etc.

February 10, 1913. Citation and Return.

A. F. MORRISON, [5]

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant and Appellant.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant and Appellant.

A copy of the within paper received this 8th day of May, 1913.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for the Defendant and Respondents.

Filed May 10th, 1913. [6]

[Title of Court and Cause.]

Praeipie of Portuguese-American Bank [as to Transcript of Record].

To the Clerk:

You are requested to incorporate into the Transcript of Record on appeal in the above-entitled matter the following papers and exhibits:

Exceptions of Defendant Portuguese-American Bank of San Francisco to Referee's Report on Final

Hearing filed April 6th, 1912.

Defendant Portuguese-American Bank's Exhibits 1, 2, 3, 4, 5 and 6, accompanying report of Referee dated October 16, 1911.

March 3d, 1913.

**KNIGHT & HEGGERTY,
JAMES B. FEEHAN,**

Solicitors for Portuguese-American Bank of San Francisco, Defendant and Appellee. [7]

Received a copy of the within Praecipe this 3d day of March, 1913.

**MORRISON, DUNNE & BROBECK,
GAVIN McNAB,
B. M. AIKINS,
M. J. GREEN,**

Attorneys for John Daniel.

C. A. S. FROST,

Attorney for Paul I. Welles.

Filed Mar. 3, 1913. [8]

[Title of Court and Cause.]

Bill of Complaint.

(By Claimant in Bankruptcy Against Trustee in Bankruptcy, a Stakeholder and Alleged Equitable Assignee; to Collect Stake Adjudicate Priorities, and Enjoin Summary Proceeding in State Court.)

To the Honorable District Court of the United States for the Northern District of California, and to the Honorable JOHN J. DE HAVEN, Judge of said Court:

The Bill of Complaint of Paul I. Welles, a citizen

of the United States and of the State of California, and a resident of Berkeley, in the Northern District of said State, against John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, Defendants, respectfully shows:

I.

That complainant is a citizen of the United States and of the State of California and a resident of Berkeley in the Northern District of said State; that he is a party to the [9] bankruptcy proceedings hereinafter mentioned, and has filed therein his claim as a secured creditor; and that said claim has been approved and allowed.

II.

That the City and County of San Francisco is, and, at all the times herein mentioned, continuously, has been a municipal corporation of the State of California duly organized and existing under and governed by a certain Charter adopted by the people of said City and County on the 26th day of May, 1898, and approved by the Legislature of the State of California on the 26th day of January, 1899; and that Thomas F. Boyle, defendant herein is, and, at all the times herein mentioned, continuously, has been the duly elected, qualified and acting Auditor of said City and County of San Francisco.

III.

That Metropolis Construction Company is, and at all the times herein mentioned continuously has been a corporation organized and existing under and by

virtue of the laws of the State of California.

IV.

That a petition praying that Metropolis Construction Company, a corporation, be adjudged bankrupt was duly and regularly filed in the District Court of the United States for the Northern District of California on December 19th, 1910; that thereafter and on January 5th, 1911, said corporation was, by order of said Court herein, duly given and made, adjudged bankrupt; and thereafter and on said last mentioned day the matter of said bankruptcy was, by said Court, by its order duly given and made, referred to the Honorable Armand B. Kreft, Referee in Bankruptcy herein. [10]

That, on February 1st, 1911, at the first meeting of creditors, duly and regularly called and held before said Referee in Bankruptcy, John Daniel was appointed Trustee of the estate of said bankrupt by order of said Referee; that thereafter and on said February 1st, 1911, said John Daniel made and filed herein his oath of office and the bond required by law and the order of said Referee as such trustee; that he thereupon became, ever since continuously has been, and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

V.

That defendant, Portuguese-American Bank of San Francisco, is a banking corporation duly organized, acting and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.

VI.

That on or about the 22d day of July, 1910, the City and County of San Francisco entered into a contract with said Metropolis Construction Company for the construction of certain sewers and appurtenances in Kentucky Street, from Channel Street South, in said City and County of San Francisco; a copy of said contract is hereunto annexed, marked Exhibit "A" and made part hereof.

VII.

That thereafter the Metropolis Construction Company proceeded with the construction work under said contract, and on the 5th day of September, 1910, the City Engineer of said City and County of San Francisco made an estimate of the value [11] of the labor done and materials incorporated in said sewers and appurtenances since his last preceding estimate thereof was made, and he estimated the same at Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, and thereupon the sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6830.85) Dollars, being seventy-five per cent (75%) of said Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, became due subject to the terms of said contract and laws of California to said Metropolis Construction Company from said City and County of San Francisco as a progressive payment on account of said contract; that said payment is called the fourth (4th) progressive or progress payment; that the Board of Public Works of the City and County of San Francisco approved said

estimate on the 5th day of December, 1910, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars; that said demand was approved by said Board of Public Works on December 5th, 1910; that thereafter, on January 3d, 1911, the Board of Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on January 4th, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board, department and committee required by law to act thereon. [12]

That said demand upon the treasury was presented to said defendant Thomas F. Boyle as Auditor of said City and County of San Francisco on or about January 6th, 1911, and is now in the possession of said defendant for his approval and allowance; that, prior to the commencement of this action, defendant Trustee made demand upon said defendant Boyle that he approve and allow said demand and deliver the same to defendant Trustee; that said defendant Boyle has failed and refused, and still fails and refuses, to approve or allow said demand or to deliver the same to defendant Trustee; that he has not any

good or sufficient reason for so doing; on the contrary, that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, is not immediately delivered by defendant Boyle to said defendant Trustee is that there exists some doubt in the mind of defendant Boyle as to whether said Trustee or complainant or said defendant bank is the one rightfully entitled thereto.

That defendant Trustee is legally entitled to the possession of said fund, subject to whatever rights therein said complainant or defendant bank may have. [13]

VIII.

That thereafter the construction work under said contract was continued and finally completed February 1st, 1911; that thereafter and prior to filing this Bill of Complaint the City Engineer of said City and County of San Francisco made an estimate of the value of the labor done and materials incorporated in said sewers and appurtenances since his last preceding (the said fourth) estimate thereof was made including the twenty-five (25) per cent withheld un-

der said contract, and he estimated the same at Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and thereupon said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, being the amount of the fifth (5th) progress payment and also the final payment, under said contract, became due subject to the conditions and laws aforesaid, to said Metropolis Construction Company from said City and County of San Francisco; that the Board of Public Works of the City and County of San Francisco approved said estimate and finally accepted said construction work on the 29th day of March, 1911, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars; that said demand was approved by said Board of Public Works on March 29, 1911, that thereafter, on April 10, 1911, the Board of [14] Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on April 11, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board,

department and committee required by law to act thereon.

That said demand upon the treasury was presented to said Thomas F. Boyle as Auditor of said City and County of San Francisco on or about April 12, 1911.

That thereafter and prior to the filing of this Bill of Complaint said Trustee in Bankruptcy, John Daniel, defendant herein, made demand upon said Auditor that he approve and allow said demand of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars and deliver the same to said Trustee; that then and there said Auditor delivered said demand to said Trustee, who immediately received the money therefor from the Treasurer of said City and County; and that said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and the whole thereof, then immediately passed into the possession of said Trustee, who thereupon paid out said sum as follows: The sum of Five Thousand Three Hundred Sixty-seven and Forty-three One Hundredths (\$5,367.43) Dollars in satisfaction of, and which did satisfy, all claims against any and all said moneys payable by said City and County to said bankrupt and in the hands of defendant Boyle, save the claims of complainant and the alleged assignment of defendant bank, and the balance of said sum, to wit: Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars to complainant [15] on account of said bankrupt's indebtedness to him; all persons having claims or liens against said moneys

in the hands of defendant Boyle save said Bank, having consented in writing, and they did consent, to the transfer of all said funds to defendant Trustee.

IX.

That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein.

X.

That said defendant, Portuguese-American Bank of San Francisco, claims some right to said moneys by virtue of an alleged assignment thereof from said bankrupt; but that, defendant bank has no assignment, as complainant is informed and believes and, therefore, alleges, and no right whatever to said moneys nor any part thereof.

XI.

That said contract, dated July 22, 1910, between said City and County of San Francisco and said bankrupt, contained specifications, a complete copy whereof is annexed to complainant's verified claim on file in said bankruptcy proceedings, but which are too voluminous to repeat here, which said specification contains, among other things, the following provisions:

In order to assist the contractor to prosecute the work advantageously, the City Engineer, shall on or about the last day of each month, make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor [16] done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part, and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$15,000.00. Such estimate need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications.

No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable un-

der this contract or his claim thereto, unless with the like consent of the Board of Public Works. [17]

XIa.

That said Board of Public Works never gave consent to any assignment of defendant bank.

XII.

That on July 30, 1910, said Metropolis Construction Company, a corporation made and entered into an agreement, with complainant, wherein and whereby it was then and there agreed that complainant was to do all of the construction work in said sewers and appurtenances for a price therein agreed to be paid complainant; a copy of said agreement of July 30, 1910, is annexed hereto, marked "Exhibit B" and made part hereof.

XIII.

That said Paul I. Welles has completed the construction of said sewers and appurtenances at Fourth and Kentucky Streets and that he has fully complied with all the terms and conditions of his said agreement with said bankrupt, and also all the terms and conditions of the agreement between said bankrupt and said City and County for the construction of said sewers and appurtenances by said bankrupt agreed to be kept and performed; that said work has been approved and accepted by the said City and County of San Francisco.

XIV.

That there now remains due and owing said Paul I. Welles from said Metropolis Construction Company the sum of \$19,844.65; that said last-mentioned sum is not subject to any setoffs or any counterclaims

on behalf of said bankrupt save certain moneys as are now due and owing from said Welles [18] to said bankrupt for said materials purchased by said Welles from said bankrupt, namely \$6,834.39; that said last-mentioned offset is subject to deductions on behalf of said Welles in certain amounts which have been paid or which must be paid out of the moneys due from said City and County for the construction of said sewers to materialmen who served notices to withhold, under said section 1184, upon said City and County, amounting to the sum of \$5,367.42; and that there is now due and owing said Paul I. Welles from said bankrupt, after said notices to withhold shall be paid, \$14,477.23, free from all setoffs or counter-claims whatsoever; except as above stated, and the payment on April 14, 1911, of the sum of Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars, mentioned in paragraph VIII hereof.

XV.

That on December Tenth, Nineteen Hundred Ten, complainant made a written notice to the owner, the said City and County of San Francisco, and to the Mayor and Board of Supervisors and Board of Public Works thereof, and to said bankrupt, that he had performed labor and furnished labor and materials to said bankrupt, and had agreed so to perform and furnish, stating in general terms the matters and things required to be stated in such a notice by section number One Thousand One Hundred Eighty-four (1184) of the Code of Civil Procedure of the State of California to which reference is hereby

made, a copy of which said notice is annexed hereto, marked "Exhibit C" and made part hereof.

That said written notice was served upon said City [19] and County, and upon said Board of Supervisors, and upon said Mayor, and upon said Board of Public Works and upon said bankrupt, and upon the Auditor of said City and County on December Twelfth (12th) 1910.

XVI.

That on December Fifteenth, Nineteen Hundred Ten, complainant made a written notice, called "Amended Stop Notice and Notice of Claim of Paul I. Welles," to said owner, said City and County of San Francisco, and to the officers, boards and corporation, mentioned in the paragraph XV, last preceding, similar in form and substance to the written notice mentioned in said paragraph XV, a copy of which said notice is annexed hereto, marked "Exhibit D" and made part hereof;

That said "amended" notice was served upon said City and County and upon said Mayor and upon said Board of Supervisors, and upon said Board of Public Works, and upon the Auditor of said City and County on December Sixteenth (16th), 1910, and upon said bankrupt on December Twenty-second (22d), 1910.

XVII.

That on March First, Nineteen Hundred Eleven, complainant made, verified and filed herein before said Honorable A. B. Kreft, Referee in Bankruptcy, his claim against said bankrupt, alleging and stating said contract, indebtedness, notices, service of

same, and securities, claiming priority as a secured creditor, to which reference is hereby made.

That on April Thirteenth, Nineteen Hundred Eleven, [20] said claim was by said Referee allowed and approved as a secured claim against said bankrupt, and its estate, in the sum of Nineteen Thousand Eight Hundred Forty-four and Sixty-five One *Hundred* (\$19,844.65) Dollars, subject to offset in favor of said bankrupt as stated in paragraph number XIV hereof.

XVIII.

That the total amount of money remaining available on said contract, part of which (\$11,149.64) is in possession of defendant Trustee and part in possession of defendant Boyle for account of said bankrupt, is Seventeen Thousand Nine Hundred Eighty and Forty-nine One Hundredths (\$17,980.49) Dollars, which is insufficient to pay the claim of complainant against said bankrupt in full; and that complainant is entitled, by virtue of said prior right, to the whole thereof; but that defendant Trustee denies said claim in part, and asserts that he is entitled thereto for the general creditors of said bankrupt.

XIX.

That out of said Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars received by said Trustee, as alleged in paragraph VIII hereof, all claims against said fund, whatsoever, have been paid and discharged, save only said claim of said defendant, Portuguese-American Bank of San Francisco, as alleged, also, in paragraph XIV hereof.

XX.

That the charter of the City and County of San Francisco, to which reference is hereby made, provides, among other things: [21]

Art. II—Chap. I—Sec. 13.

Every bill or resolution providing for any specific improvement, or the granting of any franchise or privilege, or involving the lease, appropriation or disposition of public property, or the expenditure of public money, except sums less than two hundred dollars, or levying any tax or assessment, and every ordinance providing for the imposition of a new duty or penalty, shall, after its introduction, be published in the official newspaper, with the ayes and noes, for at least five successive days (Sundays and legal holidays excepted) before final action upon the same. If such bill be amended, the bill as amended shall be in cases of great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed two hundred dollars, as shall be necessary to meet the requirements of such necessity.

Art. II—Chap. I—Sec. 19.

Except as provided in Chapter III of Article III of this Charter, all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the Treasurer, be first approved by the Board of Supervisors. All demands for more than two hundred dollars shall be presented to the Mayor for his approval, in the manner hereinbefore provided for the passage of bills or reso-

lutions. All resolutions directing the payment of money other than salaries of wages, when the amount exceeds five [22] hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper.

Art. III—Chap. I—Sec. 15.

The Supervisors shall authorize the disbursement of all public moneys, except as otherwise specifically provided in this Charter.

Art. IV—Chap. I—Sec. 3.

* * * * *

The Mayor shall from time to time recommend to the proper officers of the different departments such measures as he may deem beneficial to public interest. He shall see that the laws of the State and ordinances of the City and County are observed and enforced. He shall have a general supervision over all the departments and public institutions of the City and County, and see that they are honestly, economically and lawfully conducted, and shall have the right to attend the meetings of any of the Boards provided for in this Charter, and offer suggestions at such meetings.

Art. VI—Chap. I—Sec. 7.

The Board* shall be the successor in office and shall have all the powers and perform all the duties of the Superintendent of Streets, Highways, and Squares, of the New City Hall Commissioners, and of the commission in existence at the time this Charter goes [23] into effect for the opening, extending, widening, narrowing, straightening, (*of Public Works.)

closing or changing the grades of streets in the City and County.

XXI.

That on or about the 26th day of January, 1911, said Portuguese-American Bank of San Francisco made and filed in the Superior Court of the State of California, in and for the City and County of San Francisco, its petition wherein and whereby it set forth its alleged claim to the possession of said demands and the proceeds thereof, and wherein and whereby it prayed that said Thomas F. Boyle be required to deliver possession thereof to it; that said petition is numbered 33836 in the records and files of said Superior Court; that thereupon said Superior Court gave and made its alternative mandate directed to said Thomas F. Boyle as Auditor of said City and County of San Francisco, requiring him immediately to audit and approve said demands and to deliver the same to said Portuguese-American Bank of San Francisco, a corporation, or to show cause before said Superior Court, on the 9th day of February, 1911, at 10 o'clock A. M., why he had not done so; that thereafter and on said 9th day of February, 1911, the said proceeding was continued upon the motion of said Portuguese-American Bank of San Francisco, a corporation, until the 19th day of April, 1911, at 10 o'clock A. M., at which time said Thomas F. Boyle is required to appear and to do as in said alternative writ of mandate commanded.

That said application for a writ of mandate is a summary proceeding and that said State Court has

no jurisdiction therein to hear nor determine conflicting claims to said funds [24] and that neither complainant nor said Trustee is a party to said mandamus proceeding.

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant Trustee said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this court, to make answer hereunto and to assert herein its claim, if any it have, upon said moneys and to abide the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained; and for such other and further relief as may be according to equity and good

conscience; and that complainant be allowed his costs and disbursements herein by him expended.

Dated: San Francisco, April 17, 1911.

PAUL I. WELLES,
Complainant.

C. A. S. FROST,
Attorney for Complainant. [25]

[Duly verified April 17, 1911.] [26]

**Exhibit "A" [to Bill of Complaint—Agreement,
Dated July 22, 1910].**

SEWER CONSTRUCTION.

**BOND ISSUE, 1904, CONTRACT No. 6-A.
RESOLUTION OF AWARD, No. 5455. (Second
Series).**

THIS AGREEMENT, made this 22d day of July, A. D. 1910, by and between Metropolis Construction Co. of the City and County of San Francisco, State of California, the party of the first part, and the **BOARD OF PUBLIC WORKS** of the **CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA**, under and by virtue of the authority granted to it as such by Article VI of the Charter of the City and County, approved January 19th, 1899, the party of the second part.

WHEREAS, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 8th day of July, A. D. 1910, has been awarded the contract for the work hereinafter mentioned;

**NOW, THEREFORE, THESE PRESENTS
WITNESSETH**, That the said party of the first

part, for and in consideration of the premises aforesaid and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will do and perform, in a good and workmanlike manner, under the direction and to the satisfaction of the said Board of Public Works, and will prosecute with diligence from day to day to completion, and will furnish the materials used in the execution and completion thereof, to [27] the satisfaction of the said Board of Works, all the following work in the said City and County of San Francisco, to wit:

The construction of sewers and appurtenances in Kentucky and Fourth Streets.

Said work to be commenced within 15 calendar days and completed within 150 calendar days from the date of contract, as specified in the notice inviting proposals therefor.

Said work shall be done according to the specifications hereunto annexed and made a part of this contract, and the materials used therein shall comply with the said specifications.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, to said party of the first part, for the work aforesaid, the following price, to wit:

(Price of each unit of work is inserted here.)

Progressive payments for said work to be made, as provided for in the specifications therefor.

And it is further understood and agreed by and between parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section I, Chapter III, Article II of the Charter of the said City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be two (2) dollars a day. [28]

Also, it is agreed and understood by the parties to this agreement, that in no case except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the work aforesaid.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

[Seal M. C. Co.]

METROPOLIS CONSTRUCTION CO.,
INC.

By CHRIS EMILLE. [Seal]

Signed, sealed and delivered in the presence of

MICHAEL CASEY, [Seal]

W. A. NEWSOM, [Seal]

P. FREDERICK, [Seal]

Commissioners, Board of Public Works of the City
and County of San Francisco.

[Seal B. P. W.]

Executed in triplicate. [29]

Exhibit "B" [Agreement, Dated July 30, 1910].

THIS AGREEMENT, made and entered into this 30th day of July, A. D. 1910, by and between **PAUL I. WELLES**, of the City and County of San Francisco, State of California, hereinafter known as the party of the first part, and the **METROPOLIS CONSTRUCTION COMPANY**, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter known as the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter set forth and contained, promises and agreed to and with the said party of the second part that the said party of the first part will construct the concrete and pipe sewer from the Channel on Fourth Street in the City and County of San Francisco thence up, in and along Fourth Street to and with the intersection of said Fourth Street to its intersection with Sixteenth Street, together with all man-holes, "Y" branches, piling and all necessary connections, all of said work to be done and performed in a good and workmanlike manner and to the satisfaction of the Board of Public Works of the City and County of San Francisco, State of California, and to furnish all of the materials and labor necessary to carry on and complete the work mentioned in the plans and specifications and contract heretofore entered into between the City and County of San Francisco and the party of the second part, for the construction of sewers and appurten-

ances in Fourth Street and Kentucky Street from Channel Street to Sixteenth Street in said City and County, a copy of which said plans and specifications being hereto attached and made a part of this agreement, the said contract heretofore referred as having been entered into between said second [30] party and said City and County of San Francisco, being dated the — day of —, A. D. 1910.

It is agreed by and between the parties hereto that the party of the first part is to furnish all of the material and labor necessary to do all of the said work, all to be done in strict accordance with the plans and specifications aforesaid which are hereto annexed, made a part of this contract, and marked Exhibit "A."

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the party of the first part will purchase from the party of the second part and the party of the second part agrees to sell at marked cost, to the party of the first part all materials which may be used by the party of the first part in the doing and the performing of all of the work hereinbefore mentioned and all the materials to be furnished which will actually enter into the aforesaid work.

IT IS FURTHER AGREED between the parties hereto that the party of the second part will pay to Moriarty & Company out of the moneys and payments due or to become due to the party of the first part for the work and labor done and materials furnished under this contract whatever sum of sums of money that may be now due or to become due to the

said firm of Moriarty & Company for the doing of the piling work under their contract with the party of the first part herein.

The party of the second part agrees to pay the party of the first part for all work done and materials furnished, as follows, to-wit:

Ninety (90%) per cent of the sum of \$33,182.00; that is to say, ninety (90%) per cent of any sum lesser or greater than said sum of \$33,182.00 to be received by said second [31] party from the City and County of San Francisco, under its contract, with said City and County aforesaid; it being understood by and between the parties hereto that as the contract of said second party with the said City and County of San Francisco is based on unit prices and quantities and that therefore the sum to be received by said second party from said City and County might vary somewhat from the sum last named. Said ninety per cent (90%) aforesaid to be paid said first party by said second party in the manner following, to-wit: Eighty (80) per cent of the sum received by the second party at the times it receives its payments under its contract with said City and County of San Francisco, the balance of said ninety (90) per cent to be paid said first party, when the second party receives its final payment under its contract with City and County of San Francisco.

It is understood all work to be done under super-

vision of Metropolis Construction Co. or its representative.

Time is and shall be of the essence of this contract.

PAUL I. WELLES. [Seal]
METROPOLIS CONSTRUCTION COM-
PANY, INC.

By CHRIS O. MILLER,
President.

[Corporate Seal]

By A. W. REMICKE,
Treasurer. [32]

Exhibit "C" [Stop Notice and Notice of Claim].

\$8,500.

PAUL I. WELLES,

versus

METROPOLIS CONSTRUCTION CO., a Corpo-
ration, EMPIRE STATE SURETY CO., a
Corporation, the CITY AND COUNTY OF
SAN FRANCISCO, California, a Municipal
Corporation, the BOARD OF SUPERVIS-
ORS of said City and County and the BOARD
OF PUBLIC WORKS thereof.

STOP NOTICE AND NOTICE OF CLAIM.

To the City and County of San Francisco, State of
California, a Municipal Corporation, and to the
Mayor thereof, and to the Board of Supervisors
Thereof, and to the Board of Public Works
Thereof, and to METROPOLIS CONSTRUC-
TION CO., a Corporation, and to EMPIRE
STATE SURETY CO., a Corporation.

You and each of you are hereby notified that Paul I. Welles, did, at the times and in the manner hereinafter mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a sewer and appurtenances in Fourth and in Kentucky Streets at and near the intersections of said streets, in the City and County of San Francisco, State of California, which said sewer and appurtenances is partially completed and is now (December 10, 1910) under construction on land belonging to the said City and County of San Francisco, to-wit: in [33] Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco;

AND THAT said City and County of San Francisco, is the OWNER of said streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety in the sum of

Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Works," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [34]

AND THAT, between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles to furnish labor and materials and to do all the construction work upon said sewer and appurtenances, and to do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., exception however, that as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work.

and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co. An inspection of the original of which contract, is hereby tendered to you and said contract is open to your inspection at any time that you may designate.

That in accordance with said sub-contract so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the 10th day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets in accordance with the terms of the contract [35] made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work under and by virtue of his sub-contract with said Metropolis Construction Co. down to and inclusive of the present time and the date of this notice.

That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed in the building and construction of said sewers and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco through its Board of Public Works and said Metropolis Construction Co.

That under and by virtue of the terms of said sub-contract so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said sub-contract for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Eighty-five Hundred (\$8500) Dollars, and that no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said sub-contract and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco through its Board of Public Works.

That the work and labor performed and materials furnished by said Paul I. Welles amounting to said sum of Eighty-five Hundred Dollars has all been inspected and accepted by the City Engineer and the same has been approved by the Board of [30] Public Works of the City and County of San Francisco, for the purpose of estimating the payment to be made by the City and County of San Francisco, to the Metropolis Construction Co. as a progress payment for work performed under the terms of the contract between said City and said Metropolis Construction Co. for the month of November, 1910. That said progress payment which has been accepted by said City Engineer and approved by said Board of Public Works, and as said Paul I. Welles is in-

formed and believes and therefore alleges, is about to be paid to the said Metropolis Construction Co. amounts to the sum of \$6,830.85.

WHEREFORE, you, the said City and County of San Francisco, and you the said Mayor thereof, and you, the said Board of Supervisors thereof, and you the said Board of Public Works thereof, and you said Metropolis Construction Co., a corporation, and you, said the Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Eighty-five Hundred (\$8500) Dollars to said Paul I. Welles, in full;

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; [37]

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said act of the legislature, ap-

proved March 27th, 1897, mentioned on page two hereof, and to hold you and each of you liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated December 10, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel,

1304 Humboldt Bank Building. [38]

Exhibit "D" [Amended Stop Notice and Notice of Claim].

\$19,867.80.

PAUL I. WELLES,

versus

METROPOLIS CONSTRUCTION CO., a Corporation, EMPIRE STATE SURETY CO., a Corporation, the CITY AND COUNTY OF SAN FRANCISCO, California, a Municipal Corporation, the BOARD OF SUPERVISORS of Said City and County, and the BOARD OF PUBLIC WORKS Thereof.

AMENDED STOP NOTICE AND NOTICE OF CLAIM OF PAUL I. WELLES.

To the City and County of San Francisco, State of California, a Municipal Corporation, and to the Mayor thereof, and to the Board of Supervisors Thereof, and to the Board of Public Works Thereof, and to METROPOLIS CONSTRUCTION CO., a Corporation, and to EMPIRE STATE SURETY CO., a Corporation.

You and each of you are hereby notified that Paul

I. Welles did, at the times and in the manner herein-after mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a concrete and pipe sewer and appurtenances, from the Channel on Fourth Street, in the City and County of San Francisco, thence up, in, and along Fourth Street to and with the intersection of said Fourth Street with Kentucky Street, thence in and along said Kentucky Street to its intersection with Sixteenth Street, in the City and County of San Francisco, State of California, which said sewer and appurtenances is [39] partially completed and is now (December 10, 1910) under construction on land belonging to said City and County of San Francisco, to-wit: in Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco, as aforesaid;

AND THAT said City and County of San Francisco, is the OWNER of said Streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond

of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety, in the sum of Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Work," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [40]

AND THAT between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles wherein and whereby it was agreed that said Paul I. Welles would construct said concrete and pipe sewer and appurtenances, together with all man-holes, "Y" branches, piling and all necessary connections, and wherein and whereby it was agreed that said Paul I. Welles would furnished labor and materials and do all the construction work upon said sewer and appurtenances, and do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made

and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., excepting however, and as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work, and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co., an inspection of the original of which contract is hereby tendered to you and said contract is open to your inspection at any time that you may designate. [41]

And in accordance with said agreement so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the first day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and furnished all the labor and materials used therein, in accordance with the terms of the contract made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work and to furnish all labor and materials used in said sewer construction.

That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed, and has furnished and supplied all labor and materials used, and to be used, in the building and construction of said sewer and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co.

THAT under and by virtue of the terms of said agreement so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said agreement for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars, accruing as follows: [42]

December 1st, 1910.

Amount paid Metropolis Construction Co.

Contractors.....	\$21,456.79
80% due Paul I. Welles under agreement	
of which sum of \$17,165.32 due him..	17,165.32
Said Paul I. Welles has received only....	9,995.88

Leaving now due said Paul I. Welles of
the said \$17,165.32, so paid contract-
ors.....\$ 7,169.44

Portion of Contract price not yet paid contractors as follows:

Estimated Contract Price.....	\$33,182.00
Less Payments.....	21,456.79
	<hr/>
	\$11,725.21
80% of said \$11,725.21 due Paul I. Welles under said agreement.....	\$ 9,380.16
10% of whole contract price (estimated) to be paid Paul I. Welles under said agreement.....	3,318.20
	<hr/>
	\$19,867.80

That no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said agreement and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco, through its Board of Public Works. [43]

AND YOU AND EACH OF YOU ARE ALSO HEREBY NOTIFIED THAT the amount in value of the labor and materials already done and furnished by said Paul I. Welles in the construction of said sewer and appurtenances is the sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, and that the amount in value of the labor and materials necessary to complete the said construction of said sewer and appurtenances is the sum of One Thousand (1,000) Dollars; a total of Thirty-

Thousand Two Hundred Sixty-one (\$30,261.00) Dollars, and that he, said Paul I. Welles, has received on account thereof the sum of Nine Thousand Nine Hundred Ninety-five and Ninety-eight Hundredths (\$9,995.98) Dollars and no more, and that there remains now due and owing said Paul I. Welles, based on the said amount in value of said labor and materials so done and furnished, the sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, and the whole thereof;

That the work and labor performed and materials furnished by said Paul I. Welles amounting in value of said sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, has all *be* inspected and accepted by the City Engineer and the same has been approved by the Board of Public Works of the City and County of San Francisco.

WHEREFORE you, the said City and County of San Francisco, and you, the said Mayor thereof, and you, said Board of Supervisors thereof, and you, the said Board of Public Works thereof, and you, said Metropolis Construction Co., a corporation, and you, said Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, [44] to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets, in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Seven Thousand One Hundred Sixty-nine and Forty-four

Hundredths (\$7,169.44) Dollars, and,

ALSO said sum of Nine Thousand Three Hundred Eighty and Sixteen Hundredths (\$9,380.16) Dollars, and,

ALSO said sum of Three Thousand Three Hundred Eighteen and Twenty Hundredths (\$3,318.20) Dollars,

AND in all the said sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars;

AND ALSO that you, and each of you, severally, and, also, jointly, reserve and pay, irrespective of any rights of said Metropolis Construction Company under its said contract dated, to-wit: July 22d, 1910, to said Paul I. Welles, the above mentioned sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, for and on account of the value in amount of labor and materials done and furnished by him in the construction of said sewer and appurtenances.

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; and

ALSO as to the nature and extent and amount in value of the labor and materials done and furnished by said Paul I. Welles [45] in the construction of said sewer and appurtenances and necessary to

complete the same;

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of Section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said Act of the Legislature, approved March 27th, 1897, mentioned on page two (2) hereof, and to hold you and each of you, liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated: December 15th, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel for Paul I. Welles,

1304 Humboldt Bank Building,

San Francisco, California.

Telephone—Kearny 4644.

Filed Apr. 18, 1911. . [46]

[Title of Court and Cause.]

Order to Show Cause.

On reading the complaint on file herein and upon motion of C. A. S. Frost, Esqr., attorney for complainant, by the Court now here ordered, that John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendant, herein, be, and appear before this Court on Wednesday, May 3d, 1911, at 10 o'clock A. M., then and there to show cause if any they have, why the said Thomas F. Boyle

should not be required to allow and approve the demand, to wit: the Fourth Progressive payment for the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars mentioned in the said bill of complaint, and to deliver the same to said John Daniel, as trustee of the estate of said bankrupt, to abide the result of this action, and also why said Portuguese-American Bank of San Francisco should not be restrained and enjoined from further prosecuting or proceeding with its application for a writ of mandate to said Thomas F. Boyle, now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, and being numbered 33,836 in the records and files of said Superior Court. [47]

[Title of Court and Cause.]

Return of United States Marshal on Order to Show Cause.

United States Marshal's Office,
Northern District of California.

I hereby certify that on the 19th day of April, 1911, I received from the attorney for the plaintiff in the above-entitled action, three certified copies of an Original Minute Order to Show Cause on file in the Clerk's Office of the United States District Court in and for the Northern District of California, and made by John J. De Haven, Judge of the said United States District Court. Said certified copies having been certified to by the Clerk of the United States District Court in and for said District, and I did

on the 19th day of April, 1911, serve one of said certified copies of Order to Show Cause upon the PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a corporation, by handing to and leaving [48] one of said certified copies of said order with V. L. FIGUEIREDO personally, who is the Cashier of the said Portuguese-American Bank of San Francisco, a corporation, in the City and County of San Francisco, in said District.

I further certify that I served one of said certified copies of said Order to Show Cause upon THOMAS F. BOYLE on the 19th day of April, 1911, by handing to and leaving one of said certified copies of said order with John J. Boyle personally, who is the brother and Chief Deputy in the office of said Thomas F. Boyle, in the City and County of San Francisco, in said District. Said Thomas F. Boyle having informed me over the telephone that he was personally just leaving the City of San Francisco, and that he would accept service of said writ by my serving the same upon John J. Boyle, his Chief Deputy.

I further certify that I served one of said certified copies of Order to Show Cause upon JOHN DANIEL, Trustee of the Estate of Metropolis Construction Company, a corporation, on the 25th day of April, 1911, by handing to and leaving one of said certified copies of said order with said John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, personally, in the City and

County of San Francisco, State and Northern District of California.

C. T. ELLIOTT,
United States Marshal.
By B. F. Towle,
Office Deputy Marshal.

Filed May 1, 1911. [49]

[Title of Court and Cause.]

Amendments to Bill of Complaint.

Now comes the complainant and, by leave of the Court in that behalf first had and obtained, makes and files the following amendments to his bill of complaint on file herein:

AMENDMENT ONE.

On page three, line twenty-two (at the beginning of paragraph seven) of said bill, strike out the word "September" and insert in lieu thereof the word "December."

AMENDMENT TWO.

On page five, line eleven (near the end of said paragraph seven) of said bill, strike out the words "and its proceeds" and insert in lieu thereof the word "for."

AMENDMENT THREE.

On page five, line eighteen (near the end of said paragraph seven) of said bill, strike out the word "fund" and insert in lieu thereof the word "demand." [50]

AMENDMENT FOUR.

On page six, line twenty-one (in the first line of

paragraph nine) of said bill, strike out the word "assets" and insert in lieu thereof the word "asserts."

AMENDMENT FIVE.

On page six, line twenty-eight (in the second line of paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

AMENDMENT SIX.

On page seven, line one (near the end of said paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

AMENDMENT SEVEN.

On page seven, line nineteen (in the second paragraph of the provisions quoted from certain specifications therein mentioned) of said bill, strike out the figures "\$15,000.00" and insert in lieu thereof the figures "\$5,000.00."

AMENDMENT EIGHT.

On page thirteen, line twenty (in the second line of the prayer) after the word "said" insert the words "demand for."

AMENDMENT NINE.

On page thirteen, line twenty-eight, of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

Dated: May 24th, 1911.

C. A. S. FROST,

Solicitor for Complainant. [51]

Receipt of a copy of within "Amendments to Bill

of Complaint" this 24th day of May, 1911, is acknowledged.

M. J. GREEN,

Solicitor for John Daniel, Trustee, Defendant.

JAS. B. FEEHAN,

Solicitor for Portuguese-American Bank of San Francisco, a Corporation, Defendant.

Filed May 24, 1911. [52]

[Title of Court and Cause.]

Return of the Portuguese-American Bank of San Francisco.

The respondent, the Portuguese-American Bank of San Francisco, hereby reserves unto itself the preliminary objection heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the petitioner herein upon the divers grounds set forth in its motion to dismiss said complaint in this matter, and said respondent, the Portuguese-American Bank of San Francisco, does not waive said question of jurisdiction by making this return, but especially challenges the jurisdiction of this Court to make or enter said order prayed for, and without waiving said point of jurisdiction, the said respondent, for the information of this Honorable Court, hereby makes return to the Order to Show Cause herein and sets forth the following specific facts relating to its title to the warrant and demand referred to in said complainant's complaint, that is to say: [53]

On December 6th, 1910, at San Francisco, Califor-

nia, the said corporation, Metropolis Construction Company, did borrow from this respondent, the Portuguese-American Bank of San Francisco, the sum of Thirty Thousand Dollars (\$30,000.00) in gold coin of the United States, and on December 7th, 1910, an additional sum of Five Thousand Dollars (\$5,000.00); that the said Metropolis Construction Company, on said December 6th, 1910, and at the time of obtaining said loan, to secure the payment of said borrowed moneys, assigned to this banking corporation its right, title and interest to three warrants for so many progressive payments in the sum of Thirty-eight Thousand Dollars (\$38,000.00), or thereabouts, upon the City and County of San Francisco, and from said municipal corporation then due and payable, on account of sewer work done and performed by said Metropolis Construction Company under a contract between said Company and the City and County of San Francisco; that written notice of said assignment by said company to this banking corporation, at the time of said assignments to it, was given to and received by the Auditor of said City and County, the official authorized and empowered by law to audit and approve said warrants.

That this banking corporation, for said consideration of said money loaned by it to said Metropolis Construction Company, was and is the holder of said assignment in good faith and for a present fair consideration and the *bona fide* holder thereof, and at the time of said transaction and transfer then did not have any reason to believe, and there was no reason, that the enforcement of such assignment

would effect a preference, and such assignment was not a preference in truth or in fact and is not charged or alleged by said trustee, or any party to this or any other proceeding or suit in this Court, or elsewhere, to be in fact a preference. [54]

That said assignment by said Metropolis Construction Company to this banking corporation was made on December 6th, 1910; that said warrants, one of which is the same warrant in controversy and mentioned in said Complaint of said Paul I. Welles, were duly approved by the Board of Supervisors and the Mayor of said City and County on January 5th, 1911, and presented to said Auditor of said City and County to audit and allow the same;

That in order to enforce its demand to possession of said warrants, this banking corporation, as stated in said complaint, has filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants and surrender the same to this respondent, the Portuguese-American Bank of San Francisco as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the Referee in Bankruptcy in said matter.

That this respondent, the Portuguese-American

Bank of San Francisco, claims and is the legal owner of said warrant and the proceeds thereof, the sole party entitled to have, demand, collect and receive all and singular the moneys represented by said warrant here in controversy, claims and is the owner of the moneys and assets evidenced by said warrant of said City and County by it held as aforesaid by virtue of the assignment to it as herein mentioned adversely against all the world, and asserts its legal right to enforce its said demand against said Auditor to approve [55] said warrants and surrender the same to this banking corporation in its said mandamus proceeding in said State Court and challenges the right of said complainant in this Court, and the power of this Honorable Court to interfere with or arrest its said mandamus proceeding in any manner or form in this forum.

This respondent further states and advises the Court that in said mandamus proceeding in said State Court the title of all adverse claims to said warrants can be fully and speedily heard and determined and said complainant can resist the adverse claims of this banking corporation in said proceeding.

Respondent, the Portuguese-American Bank of San Francisco, further alleges and advises this Honorable Court that said assignment of said warrants was made as aforesaid to this banking corporation on December 6th, 1910, as hereinbefore stated; that the petition to adjudicate said corporation a bankrupt was filed in this Court on December 19th, 1910, and the said adjudication in bankruptcy made on January 5th, 1911.

This respondent further alleges that the said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrant, and bases his refusal to do so upon the ground that there are adverse claimants to said warrant and the moneys represented thereby, to wit, this banking corporation, said Paul I. Welles and the said trustee in bankruptcy herein.

WHEREFORE, having fully set forth the truth and fact relating to said transaction, this respondent prays that said Order to Show Cause be discharged, the said complaint dismissed, and for such other and further order in the premises as may be meet and proper.

JAMES B. FEEHAN,
Attorney for Respondent.

EDWARD LANDE,

Of Counsel. [56]

[Duly verified June 19, 1911.]

Filed Jun. 20, 1911. [57]

[Title of Court and Cause.]

**Amended Return of the Portuguese-American Bank
of San Francisco.**

Defendant, the Portuguese-American Bank of San Francisco, by leave of court first had, to more fully and completely present its rights herein, hereby makes its Amended Return to the Order made by this Honorable Court on the Bill of Complaint of the complainant herein, requiring this defendant to show cause why Thomas F. Boyle, the Auditor of this City

and County of San Francisco, should not be required to allow and approve the demand therein described, and deliver the same to the Trustee in Bankruptcy, and why this defendant should not be restrained from prosecuting its suit in mandamus against the Auditor of the City and County of San Francisco, now pending in the Superior Court of said City and County, to compel said Auditor to approve and deliver to defendant certain demands mentioned in said petition.

1. This defendant expressly refuses to consent to the jurisdiction of this Court to render any judgment or decree or to [58] make any order in this proceeding affecting the rights of this defendant, and hereby reserves unto itself the objections heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the complainant herein upon the grounds set forth in its motion to dismiss said Bill of Complaint, and makes this Return solely under compulsion of said Order to Show Cause.

2. That the Metropolis Construction Company, the bankrupt, prior to December 5th, 1910, was engaged in constructing certain sewers in San Francisco under contracts with the City and County of San Francisco. That said contracts provided for monthly progress payments, the amount of work done and the progress payments due thereon to be ascertained by the City Engineer and the work done to be approved by the Board of Public Works. During the month of November, 1910, certain work was done under said contracts by said Construction Company, and it was measured by the City Engineer and ap-

proved by the Board of Public Works, and progress payments therefor aggregating about Thirty-eight Thousand Dollars (\$38,000.00) ordered paid by the Board of Public Works of the City and County of San Francisco on the 5th day of December, 1910. That three separate demands upon the Treasury of the City and County of San Francisco for these payments were drawn and were approved by said Board of Public Works, by the City Engineer and by the Finance Committee of the Board of Supervisors of said City and County. That in the ordinary course of procedure these demands would be finally paid by the Treasurer about December 12th, 1910. *These demands include the demand described in the Bill of Complaint of the Complainant herein.*

That said warrants or demands were approved as aforesaid by said Board of Public Works, the said City Engineer and the said Finance Committee, on said December 5th, 1910, and at said date the [59] moneys represented by said demands became due to said Metropolis Construction Company.

3. That thereafter, and on December 6th, 1910, said Metropolis Construction Company applied to the Portuguese-American Bank of San Francisco for a loan of Thirty Thousand Dollars (\$30,000.00), offering, as security therefor, to assign to the said bank the said demands upon the Treasury of said City and County and the proceeds thereof and the moneys represented thereby; that on said December 6th, 1910, pursuant to said application, the said bank loaned to said Metropolis Construction Company the sum of Thirty Thousand Dollars (\$30,000.00), gold coin of

the United States, and at the same time and as part of the same transaction, and for and in consideration of said loan, the said Metropolis Construction Company assigned, transferred and set over absolutely to said bank the said demands and the moneys represented thereby; that said bank thereupon and thereby became and ever since has been, and now is the owner of said demands and the moneys represented thereby and entitled to the exclusive possession thereof; that thereafter, and on the 7th day of December, 1910, said bank, at the request of the said Metropolis Construction Company, and on the strength and security of said assignment, advanced and loaned to said Metropolis Construction Company the further sum of Five Thousand Dollars (\$5,000.00), gold coin of the United States, making in all advances or loans of Thirty-five Thousand Dollars (\$35,000.00). That said loans draw interest at the rate of seven per cent (7%) per annum. That no part of said loans or either of them has been repaid.

That said assignment was made to said Portuguese-American Bank of San Francisco by said Metropolis Construction Company, prior to the filing of the petition in bankruptcy herein and prior to the commencement of any proceedings in any court against said Construction [60] Company affecting its credit or solvency and while said Construction Company was a solvent, going concern, engaged in business on a large scale in said City and County and the holder of valuable contracts with said City and County.

That said money was loaned by the said bank and

said assignment accepted in good faith, in the ordinary course of business and without notice to or knowledge on the part of the said bank, or any of its officers, at any time, that said Metropolis Construction Company was insolvent, or in any way involved, or that its credit was impaired, or that insolvency or receivership proceedings were contemplated by or against it; that at the time of said assignment this bank did not, nor did any of its officials, have any reason to believe, and there was no reason, that the enforcement of said assignment would effect a preference, and such assignment is not a preference in truth or in fact; but, on the contrary, said bank, at the time said assignment was made, and at all times prior thereto, considered said Metropolis Construction Company financially sound and successful and amply able to meet all its obligations; that at all said times said Metropolis Construction Company enjoyed a large credit.

4. That this defendant, at all times subsequent to said assignment, to wit: December 6th, 1910, and prior to the filing of the petition in bankruptcy herein, claimed and was, and it now claims to be and is the owner and holder of the legal title of said warrants, and the proceeds thereof and the moneys represented thereby and the sole party entitled to have, demand, collect and receive, all and singular the moneys represented by said warrants herein in controversy.

5. *That none of said demands upon the Treasury was ever in the possession of said bankrupt, either by itself, its agent or [61] agents, or any person*

representing it, at any time subsequent to the said assignment to this bank. *That said demands were never in the possession of the Trustee in Bankruptcy, or under the control of the Bankruptcy Court*, but, on the contrary, said warrants were always, subsequent to December 5th, 1910, and are now in the possession of the officials of the City and County of San Francisco. That none of the moneys represented by said demands has ever been withdrawn from the Treasury of the City and County of San Francisco.

6. That this defendant, in order to enforce its demand to possession of said warrants, as stated in said Bill of Complaint, on January 26th, 1911, and *before the appointment of the Trustee* herein, filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants, including the demand herein sued for, and surrender the same to this defendant, as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the *Referee in Bankruptcy* in said matter.

That none of the parties to said mandamus proceedings are parties to the proceeding in bankruptcy.

That defendant is informed and believes, and therefore alleges that said Superior Court, in said man-

damus proceeding, has full jurisdiction to determine the rights and claims of the said complainant and the trustee, and all persons whatever to the possession of said warrants and the moneys represented thereby. [62]

This respondent further alleges that said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrants, and bases his refusal upon the ground that there are adverse claimants to said warrants and the moneys represented thereby.

7. That said Auditor must determine who is legally entitled to the possession of said demand and is responsible personally and on his bond for the delivery thereof to the property party; that this defendant claims to be the owner and entitled to the possession thereof; that title and right of possession can be determined only by a judgment on the merits and not at this stage of the proceeding; that said Auditor and this defendant object, and each objects, that this Honorable Court is without jurisdiction to enter into a trial on the merits, and neither consents to being made a party defendant herein. That this Honorable Court on the facts set forth in this Amended Return should not make any order at this time which might prejudice the legal rights of said Auditor or this defendant by changing the status and actual possession of the property in controversy.

That the mandamus suit now pending in the Superior Court, and which it is herein sought to be restrained, is brought to enforce the approval, audit and delivery of *two other demands* besides the one in

controversy, and for this reason, as well as others, this Court should not enjoin the prosecution of said suit.

That an assignment for security transfers the legal title.

Gilman vs. Curtis, 66 Cal. 116.

That the Superior Court can try title in mandamus,
see

Bannerman vs. Boyle, decided by California Supreme Court in bank June 8th, 1911, and reported in The Recorder on June 10, 1911, also reported in Cal. Decisions issue of June 16, 1911, Vol. 41, page 703.

McKannay vs. Horton, 151 Cal. 711. [63]

WHEREFORE, this defendant prays that this Honorable Court make no order in this summary proceeding requiring said Auditor to audit, allow or approve said demands, or deliver the same to the bankrupt, or said trustee, or restraining this defendant from prosecuting said action in said Superior Court; that said Order to Show Cause be discharged, and for such other and further orders as may be meet and proper in the premises.

JAMES B. FEEHAN,
Attorney for Respondent.

EDWARD LANDE,
Of Counsel. [64]

[Duly verified June 27, 1911.]

Filed Jun. 27, 1911. [65]

[Title of Court and Cause.]

Exceptions to Amended Return of Portuguese-American Bank of San Francisco.

The complainant objects and excepts to the amended return of the Portuguese-American Bank of San Francisco, alleged to be its amended return to the order to show cause herein, and avers that said amended return is insufficient in the following particulars, to wit:

I.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner it is claimed that said Metropolis Construction Company assigned or transferred or set over said demand or warrant in controversy, or moneys represented thereby, to said banking corporation.

II.

Said amended return is insufficient in that it does [66] not appear and cannot be ascertained therefrom how or in what manner, it is claimed said bank is the legal owner of said warrant, or the proceeds thereof, or whether or not said bank is the owner of said warrant, or proceeds, at all.

III.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom whether it is claimed said alleged assignment or transfer was verbal or in writing or in what said alleged assignment consists.

IV.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom what basis, if any, exists for the alleged claim of said Portuguese-American Bank of San Francisco to be the owner of said warrant or to have an assignment thereof.

V.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner said bank claims adversely, in that the alleged facts constituting said claim are not disclosed.

VI.

That said amended return is insufficient in that it does not show any *facts* which, if true, constitute a reasonable ground of controversy as to the legal title to said demand; the statement of said bank that it has an "assignment" of, or is the "owner" of said demand, being merely a conclusion of law, unsupported by any *alleged* facts.

C. A. S. FROST,

Solicitor for Complainant.

June 30, 1911. [67]

Receipt of a copy of within *Exceptions* this 3d day of July, 1911, is admitted.

JAS. B. FEEHAN,

Attorney for Defendant Portuguese-American Bank
of San Francisco.

Filed Jul. 3, 1911. [68]

[Title of Court and Cause.]

**Amended Return to Order to Show Cause, and
Answer of Thomas F. Boyle, Defendant.**

Now comes Thomas F. Boyle, as one of the defendants in the above-entitled action, and by leave of Court first had and obtained, makes and files the following amended return to the order to show cause, issued herein, and makes and files the following also as his answer to the bill of complaint herein:

I.

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, XI, XIa, XV, XVI, XVII, and XX, of said bill of complaint.

II.

Admits each and every allegation set forth in paragraph VII of said bill of complaint, except the allegations set forth on lines 20, 21, and 22, page 4 of said bill, in said paragraph VII, and the allegations set forth on lines 17, 18 and 19, page 5 of said bill, in said paragraph VII, and each and every of said allegations are denied. [69]

III.

Denies that allegation set forth in paragraph IX of said complaint, that only the complainant, defendant trustee, and the defendant Portuguese-American Bank assert claims to said demand, and in this regard alleges that certain claims, rights, offsets, or counterclaims are made to the demands of money therein referred to, by Empire State Surety Company, a corporation, Central Trust Company, of California, and Pacific Coast Casualty Com-

pany, who have filed notices of such claims in the office of this defendant as Auditor of the City and County of San Francisco, true copies of which notices are attached hereto and made a part hereof, and are marked respectively Exhibit "A," Exhibit "B," Exhibit "C." The notices of claim of said Portuguese-American Bank are attached hereto and made a part hereof, and marked Exhibits "E" and "F."

IV.

That defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs XII, XIV and XVIII of said bill of complaint, and therefore he denies each and every of said allegations.

V.

Admits that the work of construction of said sewers and appurtenances at Fourth and Kentucky streets, in said City and County of San Francisco, has been approved and accepted by said City and County.

VI.

Admits that on or about the 13th day of April, 1911, acting under authority of a document filed in his office, a true copy of which, marked Exhibit "D," is attached hereto, and made a part hereof, defendant approved and delivered to John Daniel, Trustee in [70] Bankruptcy a warrant or demand in the sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, in favor of the Metropolis Construction Company, being for the final payment on the Fourth and

Kentucky streets sewer contract, but alleges that this defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs VIII and XIX of said bill of complaint as to the disposition made by said Trustee of said warrant or demand, and the payment by said Trustee of any moneys obtained by him by virtue of said warrant, and therefore he denies each and every of said allegations.

VII.

Admits each and every allegation contained in paragraph XXI of said bill of complaint except the allegation set forth on lines 15 and 16, page 13 of said bill, which allegation is denied and in that regard, it is alleged that said State Court has jurisdiction to hear and determine conflicting claims to said funds.

VIII.

Defendant alleges that he has not, nor has he had at any time, in his possession or under his control, any moneys claimed by any of the parties to this action, but admits that he has in his possession, awaiting his official approval as Auditor of said City and County of San Francisco, a warrant or demand in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, payable to the Metropolis Construction Company, as the fourth progress payment on the contract for the construction of the Fourth and Kentucky street sewer, and that he has not approved said warrant or demand, because of the conflicting claims to the [71] right of possession of said warrant, as is more

fully set forth herein, and in the bill of complaint, and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stake holder.

IX.

Defendant further alleges that the alternative writ of mandate and order to show cause why he should not deliver possession of the demand to the Portuguese-American Bank of San Francisco, issued by the Superior Court of the State of California, in and for the City and County of San Francisco, as is more fully set forth in paragraph XXI of the bill of complaint, is yet in full *and* force and effect, and that defendant is now subject to said order of said Superior Court, and is awaiting adjudication by said court of the conflicting claims to the right of possession of said demand, so that he may know to whom said demand shall be delivered by him.

WHEREFORE, defendant prays that he may be hence dismissed.

THOS. F. BOYLE,
Defendant.

EDWARD F. MORAN,
Attorney for Defendant Thomas F. Boyle. [72]
[Duly verified June 30, 1911.] [73]

**Exhibit "A" [to Amended Return and Answer of
Thomas F. Boyle—Notice Dated December 15,
1910].**

San Francisco, Calif., Dec. 15, 1910.

**NOTICE to the
BOARD OF PUBLIC WORKS, City and County
of San Francisco, State of California,
BOARD OF SUPERVISORS, City and County of
San Francisco, State of California,
CITY AND COUNTY OF SAN FRANCISCO,
STATE OF CALIFORNIA, a Municipal Cor-
poration,
METROPOLIS CONSTRUCTION COMPANY, a
Corporation,
PAUL I. WELLES.**

You and each of you will please hereby take notice that on the 21st day of July, 1910, in the City and County of San Francisco, State of California, the **METROPOLIS CONSTRUCTION COMPANY**, a corporation, did, by and through its officers thereunto duly authorized, make application to the undersigned **THE EMPIRE STATE SURETY COMPANY**, for contractors bonds in the sum of Seven Thousand and 00/100 (\$7000.00) Dollars, and Seventeen Thousand and 00/100 (\$17,000.00) Dollars, respectively conditioned for the performance of the contract for the construction of Sewer System along and upon Fourth and Kentucky Streets, City and County of San Francisco, State of California.

You are further notified that subsequent to the making of such application said bonds were in due

form regularly and legally issued and delivered, and that the said METROPOLIS CONSTRUCTION COMPANY, thereafter commenced and has since prosecuted the work under said contract.

That the performance of the work has now ceased and that under and by virtue of the agreement between the Metropolis Construction [74] Company, a corporation as aforesaid, and THE EMPIRE STATE SURETY COMPANY it is provided that in the event of the METROPOLIS CONSTRUCTION COMPANY defaulting in the performance of the said contract, the said THE EMPIRE STATE SURETY COMPANY, shall have the right to collect and reserve all reserve percentages and all moneys due and to become due said Principals under said contract, and to hold and apply the same as collateral to the obligations of said METROPOLIS CONSTRUCTION COMPANY, said agreement being dated July 21st, 1910.

You are therefore hereby notified that all moneys in your hands must be held under the terms of said agreement for the use and purposes therein provided and that you will not pay out the same or any part thereof, excepting in accordance with the terms of said agreement.

Dated this 15th day of December, 1910, at San Francisco, California.

[Seal] THE EMPIRE STATE SURETY COMPANY,

By JAS. C. HAYBURN,
Attorney in Fact and General Agent. [75]

**Exhibit "B" [to Amended Return and Answer of
Thomas F. Boyle—Letter Dated December 13,
1910—Gavin McNab to Thomas F. Boyle].**

COPY.

December 13th, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco,

City Hall,

McAllister St., City.

Dear Sir:—

You are hereby notified that Central Trust Company of California, a corporation having its offices at the corner of Sansome and Market Streets, San Francisco, claim to have, and has a valid claim and demand against and interest in any moneys which are now due and payable, or which may become due and payable to Metropolis Construction Company, for services rendered and materials furnished to the City and County of San Francisco (or any department thereof), and you are hereby requested to disallow and disapprove any claim or demand against the City and County of San Francisco or any department thereof, presented to you to be audited by Metropolis Construction Company or any assignee of Metropolis Construction Company, unless the Central Trust Company hereafter consents to such approval of such claim or demand.

The Metropolis Construction Company, a corporation, is now indebted to the Central Trust Company of California, in the sum of \$60,000.00, which sum is evidenced by the promissory notes of Metropolis Construction Company, for moneys loaned and advanced by Central Trust Company of California to Metro-

polis Construction Company, to enable it to purchase materials, and to perform labor in carrying out its contracts with the City and County of San Francisco, and that by reason of the furnishing and advancing said moneys to Metropolis Construction Company said Central Trust Company of California has a valid claim and demand and interest in [76] any moneys now payable to Metropolis Construction Company.

Yours truly,

GAVIN McNAB,

Attorney for Central Trust Company. [77]

Exhibit "C" [to Amended Return and Answer of Thomas F. Boyle—Notice Dated February 3, 1911].

COPY.

THE MARSHALL A. FRANK COMPANY.

San Francisco, Cal., February 3, 1911.

To the City and County of San Francisco, the Honorable Board of Supervisors of Said City and County, the Board of Public Works, and to Honorable Thomas F. Boyle, Auditor:

Dear Sirs:—

You and each of you are hereby notified that the **PACIFIC COAST CASUALTY COMPANY**, a corporation, heretofore gave a bond conditioned on the faithful performance by the **METROPOLIS CONSTRUCTION COMPANY**, of that certain contract known as contract number 36, for the construction of sewers and appurtenances in the Lower Sunset District in the City and County of San Francisco.

Pursuant to notice from the Board of Public Works of the City and County of San Francisco, and

under authority of the United States District Court, for the Northern District of California, sitting in bankruptcy, the **PACIFIC COAST CASUALTY COMPANY** has undertaken to complete the said contract.

You are hereby further notified not to pay to anyone on behalf of the **METROPOLIS CONSTRUCTION COMPANY**, or to anyone other than the undersigned, any moneys due or earned, or that may become due under said contract.

You are particularly notified not to make any payment to the Portuguese American Bank of San Francisco under notice by it of purported assignment to said Bank of alleged rights to certain of said moneys, or to the United Railroads under notice of purported [78] assignment to it of alleged rights of certain of said monies, and are notified not to make, execute, audit or deliver, warrant or demand to any person or corporation whatsoever, other than to the undersigned.

THE UNDERSIGNED, PACIFIC COAST CASUALTY COMPANY, hereby claims as surety as aforesaid, that it is entitled to have all of said monies applied to the completion of said work, and for any diversion of said monies, or any thereof, or any appropriation of said monies to the use or benefit of another, the said **PACIFIC COAST CASUALTY COMPANY** will be obliged to hold you respectfully responsible.

Very respectfully,

(Signed) **PACIFIC COAST CASUALTY CO.**

MARSHALL A. FRANK,

Attorney-in-fact. [79]

**Exhibit "D" [to Amended Return and Answer of
Thomas F. Boyle—Letter Dated March 15, 1911,
to T. F. Boyle].**

March 15, 1911.

Thomas F. Boyle, Esq.,

Auditor of City and County of San Francisco,
San Francisco, Cal.

Dear Sir:

You are authorized to deliver the warrant for the final payment (\$11,149.64) on the contract to the Metropolis Construction Co., a corporation, with the City and County of San Francisco, for the construction of sewers and appurtenances at Fourth and Kentucky Streets in said City and County to John Daniel, Trustee in bankruptcy, it being understood that said Trustee will take the same subject to notice to withhold for the amounts, and filed on the dates, respectively, set opposite our names below:

Name.	Amount.	Date.
Moriarity & Perkins, by C. A. S.		
Frost, Counsel.	\$820.26	December 12, 1910.
Santa Cruz Portland Cement Co., by L. F. Young Leahy.	2519.00	Feb. 18, 1911.
Paul I. Welles.	19867.80	Dec. 16, 1911.
Bay Development Co.	493.95	Jan. 4, 1911.
Vallejo Brick & Tile Co., Con., by C. Hidecker, Gen. Manager.	609.51	Feb. 21, 1911.
San Francisco Gas & Electric Co., by J. M. Shields, OK. L.		
H. S.	226.75	Feb. 4, 1911.
Loop Lumber Co., by R. T. Hardy.	121.96	Feb. 4, 1911.
Mutual Teaming Co.	676.00	Dec. 20, 1911.

Exhibit "E" [to Amended Return and Answer of Thomas F. Boyle—Notice Dated December 17, 1910].

COPY.

PORTUGUESE-AMERICAN BANK.

San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works
and to the Board of Supervisors of the City and
County of San Francisco.

Gentlemen:—

You are hereby notified that the Metropolis Construction Company has assigned, for value, to the Portuguese-American Bank of San Francisco the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85 being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Construction Co. and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said

City and County and dated June 22nd, 1910, and being for construction of sewer in 7th [81] Street, Howard to Hubbell Streets under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions to the Board of Public Works authorizing said fourth progressive payments.

Yours very truly.

(Signed) PORTUGUESE-AMERICAN BANK
OF S. F.

By JAS. B. FEEHAN,
Atty. [82]

**Exhibit "F" [to Amended Return and Answer of
Thomas F. Boyle—Notice Dated December 5,
1910].**

COPY.

San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of
San Francisco.

Dear Sir:—

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth

Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910 for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th street, Howard to Hubbell Streets under contract No. 31.

(Signed) **METROPOLIS CONSTRUCTION
COMPANY, INC.,**

By _____,
President. [83]

Due service and receipt of a copy of the within return to the order to show cause and answer is hereby admitted this 30th day of June, 1911.

O. A. S. FROST,
Attorney for Complainant.

Filed Jul. 3, 1911. [84]

[Replication to Answer of Thomas F. Boyle.]

[Title of Court and Cause.]

**REPLICATION OF PAUL I. WELLES, COM-
PLAINANT, TO THE ANSWER OF
THOMAS F. BOYLE, DEFENDANT.**

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of

exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Thomas F. Boyle, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed. [85]

July 8th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of within Replication this 8th day of July, 1911, is admitted.

E. F. MORAN,

Attorney for Defendant Thos. F. Boyle.

Filed Jul. 10, 1911. [86]

[Order Referring Case to Referee to Hear Testimony and Find Facts, etc., and Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]

[Title of Court and Cause.]

ORDERED that this case be referred to A. B. Kreft, Referee, to hear the testimony and find the facts upon all the issues made by the pleadings, and report the same to this Court, and that in the meantime, and until the further order of this Court the defendant Portuguese-American Bank of San Francisco, be restrained from prosecuting the mandamus proceeding mentioned and referred to in the bill of complaint filed herein.

Dated: July 11th, 1911.

JOHN J. DE HAVEN,
Judge.

Filed Jul. 11, 1911. [87]

[Order Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]

[Title of Court and Cause.]

This case having been heretofore submitted to the Court on an order to show cause and returns thereto, now after due consideration had thereon, the Court made and filed its order referring the case to A. B. Kreft, Referee in Bankruptcy, to hear the testimony and find facts on all issues made by the pleadings and report, and in the meantime and until the further order of the Court the defendant Portuguese-Ameri-

can Bank of San Francisco is restrained from prosecuting the mandamus proceedings mentioned and referred to in the bill of complaint filed herein. [88]

[Answer of John Daniel, Trustee, etc.]

[Title of Court and Cause.]

**ANSWER OF JOHN DANIEL, TRUSTEE OF
THE ESTATE OF METROPOLIS CON-
STRUCTION COMPANY, A CORPORA-
TION, BANKRUPT, DEFENDANT.**

Now comes John Daniel, Trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and for answer to Bill of Complaint, as amended, admits, denies and alleges as follows:

I.

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIa, XII, XIII, XV, XVI, XVII, XIX, XX, and XXI of said Bill of Complaint as amended.

II.

Denies the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended, except that defendant [89] Daniel admits that there has been an accounting between complainant and defendant Daniel had in this court in the matter of the estate of said bankrupt before the Referee herein, which said accounting cannot be fully and finally completed, and the various amounts due adjusted, unless and until the respective claims of the complainant and the defendant, Portuguese-Ameri-

can Bank of San Francisco, a corporation, to the Fourth Progress payment due the bankrupt on its contract with the City and County of San Francisco for the construction of sewers and appurtenances in Fourth and Kentucky Streets shall have been heard and determined; and in that behalf, defendant Daniel requires proof of the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended.

III.

And defendant Daniel alleges, that on the 21st day of December, 1910, he, together with A. B. Tognazzi and Edmund F. Greene, were, by order of this Court duly given and made, appointed receivers of the estate of property of Metropolis Construction Company, a corporation, bankrupt herein; that said Receivers on said day duly qualified and immediately took possession among other things of the contract of said bankrupt with the City and County of San Francisco and proceeded to complete, and thereafter continued work upon (through Paul I. Welles, Complainant, sub-contractor), and completed, said contract; that thereafter, and on the 1st day of February, 1911, said Receivers resigned and delivered possession of all of the property of said bankrupt (including said bankrupt's rights under said Fourth and Kentucky Streets contract) to defendant Daniel, who, on said February 1st, was [90] appointed and qualified as Trustee of said bankrupt's estate, in accordance with an order of this Court herein duly given and made.

WHEREFORE, defendant Daniel joins the com-

plainant in his prayer for an accounting, and prays that said warrant be delivered up to him and the proceeds thereof ordered distributed, either to the general creditors of said bankrupt, or to secured creditors, as may be according to justice and equity.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorney for Defendant Daniel. [91]

[Duly verified February 5, 1911.]

Filed Sep. 5, 1911. [92]

[Answer of Portuguese-American Bank of San Francisco.]

[Title of Court and Cause.]

THE ANSWER OF THE PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, A CORPORATION, ONE OF THE ABOVE-NAMED DEFENDANTS, TO THE AMENDED BILL OF COMPLAINANT, PAUL I. WELLES.

Now comes said Portuguese-American Bank of San Francisco, a corporation, one of the defendants herein, not waiving but insisting upon its objections to the jurisdiction of this Court, and not consenting to its jurisdiction but expressly declining to consent to such jurisdiction, and not waiving the benefit of its demurrer to the jurisdiction of this Court heretofore interposed to said amended bill of complaint; and saving and reserving to itself now, and at all times hereafter, all and all manner of benefit and

advantage of exception which can or may be had or taken to the said amended bill of complaint, for answer thereto says:

I.

This defendant admits that the allegations of paragraphs I, II, III, IV, V and VI, of said amended bill of complaint are true. [93]

II.

This defendant admits that the allegations of paragraph VII, of said amended bill of complaint, down to and including the word "County," on line 19, page 4, are true; denies that the demand therein mentioned has been allowed by every officer, board, department and committee required by law to act thereon, and in this behalf avers that said demand has not been allowed by the Auditor of the City and County of San Francisco, and that said Auditor is an officer required by law to act thereon; admits that said demand was presented to said Auditor, Thomas F. Boyle, on or about January 6, 1911, for approval or allowance; admits that said demand is now in the hands of said Auditor; admits that prior to the commencement of this action defendant Trustee demanded of defendant Boyle that he approve and allow said demand and deliver it to said Trustee, and that said Boyle has failed and refused to so deliver said demand, and still fails and refuses to do so; denies that said defendant Boyle has not any good or sufficient reason for so failing and refusing to deliver said demand to said Trustee, and in this behalf avers that this defendant was at all said times, and is now, the owner of said demand by

assignment thereof for a present valuable consideration from the Metropolis Construction Company, a corporation, and was at the time of said demand upon said Boyle by said Trustee, and ever since has been, and is now, the owner of and entitled to the possession thereof; and that notice of defendant's claim to said demand was served on said Auditor prior to said demand by said Trustee; denies that said Auditor Boyle individually or as Auditor of said City and County of San Francisco, has not, or does not assert any claim to said demand or to the sum of \$6,830.85, or any part thereof, or any offset or counterclaim thereto, and in this [94] behalf avers that said Boyle individually and as Auditor does assert a claim to said demand; this defendant has not sufficient information on which to form a belief as to whether said City and County of San Francisco, or any officer, agent or department thereof, asserts or has any claim to said demand or money, or offset or counterclaim thereto, and for that reason denies that said City and County, or any officer, agent or department thereof, does not assert or has not a claim to said demand or money, or offset or counterclaim thereto, or to either; denies that the sole or only or any reason why said Boyle does not immediately deliver said demand for \$6,830.85 to said Trustee, is that there exists some doubt in the mind of said Boyle as to whether said Trustee, or complainant, or this defendant is rightfully entitled thereto, but on the contrary this defendant avers the reason is that defendant Boyle holds said demand for the person legally entitled thereto, and refuses

to deliver it to said Trustee in order to protect himself from liability in damages; denies that said Trustee is legally entitled, or entitled, to the possession of said demand.

III.

Answering paragraph IX of said amended bill of complaint, defendant is informed and believes, and therefore alleges that the United Railroads of San Francisco, a corporation, asserts a claim and right in and to the demand of \$6,830.85, mentioned in paragraph VII, and for that reason denies that no person, firm or corporation asserts any claim, right, offset or counterclaim whatever to said demands or moneys or any part thereof, save only complainant, said defendant Trustee and this defendant.

IV.

Admits that this defendant claims a right to said demand for [95] \$6,830.85, by virtue of an assignment thereof from the Metropolis Construction Company, bankrupt; denies that this defendant has no assignment thereof, or has no right to said moneys or any part thereof, and in this behalf avers that on December 6, 1910, this defendant loaned to said Metropolis Construction Company thirty thousand dollars in gold coin of the United States, and at the same time, for and in consideration thereof, and as part of the same transaction said Metropolis Construction Company assigned, set over and transferred absolutely to this defendant, the said demand and the moneys represented thereby; that ever since said December 6, 1910, this defendant has been and is the owner of said demand and moneys represented

thereby, and is entitled to the exclusive possession thereof.

V.

Admits that the statements of paragraph XI of said amended bill of complaint, are true.

VI.

Denies that the Board of Public Works never gave consent to any assignment to defendant Bank, as alleged in Paragraph XI-a.

VII.

This defendant denies, upon information and belief, that on July 30, 1910, or at any time, the Metropolis Construction Company made or entered into the agreement with complainant, mentioned in Paragraph XII of said amended bill of complaint.

VIII.

Admits that complainant has completed the construction of sewers and appurtenances in Fourth and Kentucky Streets, but denies on information and belief that said work was done under the agreement set forth in Paragraph XII, or in compliance with its terms or conditions; admits that said work was done in compliance with the [96] terms and conditions of the agreement between the Metropolis Construction Company and the City and County of San Francisco, for the construction of said sewers and appurtenances; admits that said work has been approved and accepted by said City and County.

IX.

Denies, on information and belief, that there remains due or owing to Paul I. Welles from the Metropolis Construction Company the sum of \$19,-

844.65, or any sum, under or by virtue of the contract mentioned in Paragraph XII between said Welles and said company, or that there are any set-offs or counterclaims in favor of said bankrupt against said Welles on said contract with said bankrupt; or that any offset is subject to deductions on behalf of said Welles by virtue of said contract with said bankrupt, or that there is now due or owing to said Welles from said bankrupt any sum of money whatever by virtue of or under said contract between said Welles and said bankrupt.

X.

Admits the allegations of paragraphs XV and XVI and XVII of said amended bill of complaint, to be true.

XI.

Denies on information and belief that there is any money available on the contract between complainant and said Metropolis Construction Company, mentioned in Paragraph XII of said amended bill of complaint; denies that any money is in the possession of defendant Boyle; denies that complainant has any claim against said bankrupt by virtue of said contract; denies that complainant is entitled by virtue of prior right, or any right, to the sum of \$6,830.85, or to the demand representing that sum; denies on information and belief that said Trustee denies said complainant's [97] claim in part, or at all; denies that said Trustee asserts that he is entitled thereto for the general creditors of the bankrupt.

XII.

Denies that out of the \$11,149.64 received by the

Trustee, as alleged in paragraph XIX of said amended bill of complaint, or at all, all claims against said fund have been paid or discharged, save only the claim of this defendant; defendant in this behalf alleges that the claim of the United Railroads of San Francisco, a corporation, against said demand and said sum of \$6,830.85, has not been paid or discharged, or released by said corporation.

XIII.

Admits that the allegations of paragraph XX of said amended bill of complaint are true.

XIV.

Admits that the allegations of paragraph XXI of said amended bill of complaint, down to and including the word "commanded," line 13, page 13, are true; denies that said application for a writ of mandate is a summary proceeding; denies that said State Court has no jurisdiction therein to hear and determine conflicting claims to said funds; admits that neither complainant nor defendant Trustee is a party to said mandamus proceeding; in this behalf defendant alleges that said alternative writ of mandate, together with summons and a copy of the complaint in said action, were served upon said Boyle prior to the commencement of this action.

XV.

Further answering said amended bill of complaint, this defendant alleges:

That it is, and was at all the times mentioned in said amended bill, a banking corporation duly organized and existing [96] under the laws of the State of California, and has and at all said times had

its principal place of business in San Francisco, California.

That for more than two years prior to the bankruptcy of the Metropolis Construction Company, a corporation, as set forth in said amended bill of complaint, said Metropolis Construction Company banked with this defendant, and obtained loans from this defendant to enable it to carry on its contracts, in the ordinary course of business.

That after the approval of the demand for the fourth progressive payment under the contract mentioned in paragraph VI of said amended bill of complaint, by the Board of Public Works of the City and County of San Francisco, on December 5th, 1910, as fully set forth in paragraph VII of said amended bill of complaint to which reference is hereby made, the said Metropolis Construction Company, on the 6th day of December, 1910, borrowed and received from this defendant the sum of thirty thousand dollars in gold coin of the United States, and at the same time, and as part of the same transaction, and as security for said loan of thirty thousand dollars, said Metropolis Construction Company, assigned, transferred and set over absolutely to this defendant the said demand for said fourth progressive payment and the money represented thereby, to wit: \$6,830.85, together with two other demands and moneys represented thereby, the three demands aggregating about \$38,000.00. That this defendant has ever since been, and now is, the owner of said demand, and said money represented thereby, and was at the time of the commencement of this action, ever since has been and now is entitled to the possession

of said demand and to receive the money upon it.

That this defendant has at all times subsequent to said 6th [99] day of December, 1910, claimed and claims said demand as the absolute owner thereof, and claimed and claims to be the sole party entitled to receive the money thereon.

That on December 7, 1910, this defendant made a further loan of \$5,000.00 to said Metropolis Construction Company, upon the said assignment.

That said loans bear interest at 7% per annum from date thereof, and that no part of said loans has been repaid, nor any of the interest accrued thereon; that there is due to this defendant on account of principal and interest on said loans the sum of \$35,000 gold coin of the United States, and interest accrued and to accrue at 7% per annum on \$30,000 from December 6, 1910, and of \$5,000 from December 7, 1910, in like gold coin.

That on the 22d day of July, 1910, and continuously ever since, the Charter of the City and County of San Francisco, contained the following provisions:
MATTERS UNDER CONTROL OF THE BOARD.

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

DRAINAGE.

2. Of all sewers, drains and cesspools, and of the work pertaining thereto or to the drainage of the City and County.

CONDUITS; GARBAGE AND SEWAGE; SEWERAGE and DRAINAGE SYSTEM.

7. Of any and all wires and conduits, the collec-

tion and disposal of street refuse, garbage and sewage, and the designing, construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9—Art. VI—Chap. I. [100]

ACCEPTANCE OF WORK.

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works;

When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec. 22—Art. VI—Chap. I.

That after the said assignment to this defendant, said demand for said fourth progressive payment under the contract mentioned in paragraph VI of said amended bill, has never been in the possession of said Metropolis Construction Company, or of the said Trustee in Bankruptcy, or of the Bankruptcy Court.

That this defendant has never appeared in said Bankruptcy proceedings affecting said Metropolis Construction Company, mentioned in paragraph IV of said amended bill of complaint.

That when the said assignment was made, and the money loaned thereon, as aforesaid, no proceedings were pending against said Metropolis Construction Company affecting or involving its credit or solvency; that said loans were made in the ordinary course of business, and said assignment accepted as

security therefor in good faith by this defendant, and without notice or knowledge on its part, or on the part of any of its officers, that said Metropolis Construction Company was insolvent, or that its credit was in any way involved or impaired, or that insolvency or receivership proceedings were to be taken against it, or that said assignment would be a preference. [101]

That said assignment vested this defendant with the legal title to said demand for \$6,930.85, under the laws of the State of California, and that this defendant has ever since claimed, and still claims, said demand and the money represented thereby, adversely to said complainant, and to said defendant Trustee, and to said defendant Boyle.

WHEREFORE, this defendant prays that it be hence dismissed with its reasonable costs in this behalf sustained.

PORTUGUESE-AMERICAN BANK OF
SAN FRANCISCO,

[Seal]

By J. A. SILVEIRA,

Vice-President.

JAMES B. FEEHAN,

Solicitor.

EDWARD LANDE,

Of Counsel. [102]

[Duly verified October 6, 1911.]

Received a copy of within answer October 6, 1911.

C. A. S. FROST,

Solicitor for Paul I. Welles.

Filed Oct. 6, 1911. [103]

[Title of Court and Cause.]

Report of Referee [Filed October 14, 1911].

To the Honorable the Judges of the *District of the United States* in and for the Northern District of California.

The undersigned, Referee in Bankruptcy, to whom, on the 11th day of July, 1911, the above-entitled cause was referred "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to this Court," respectively reports as follows:

Said matter was brought on for hearing on the 8th day of August, 1911, and was continued from time to time until the 5th day of September, 1911, when the matter was submitted. The testimony and proceedings were taken in shorthand by Brainard C. Brown, and a transcript thereof is herewith submitted. I was attended upon said hearing by C. A. S. Frost, Esq., attorney for complainant, Milton J. Green, Esq., attorney for trustee, and James B. Feehan, Esq., and J. P. Allen, Esq., attorneys for Portuguese-American Bank. E. F. Moran, Esq., attended as attorney for Thomas F. Boyle.

John Daniel will hereinafter be referred to as the Trustee; the Metropolis Construction Company as the Company; the Portuguese-American Bank as the Bank; Thomas F. Boyle as the Auditor and the City and County of San Francisco as the City. No issues were [104] raised as to the identity of the respective parties or as to their respective positions or capacities as alleged in the bill of complaint.

The pleadings before the Referee are the bill of complaint as amended; the order to show cause, made herein on April 19, 1911; the answer of Auditor Boyle, which is also his return to said Order to Show Cause; the amended return of the Portuguese-American Bank to the Order to Show Cause.

This suit concerns the claims made by the various parties to a paper demand or warrant in the possession of the Auditor, and being a warrant for payment of the fourth progressive payment under a certain contract, hereinafter referred to, for the construction of sewers in Kentucky and Fourth Streets, San Francisco.

Prior to the taking of testimony the Bank saved its objections to the jurisdiction of the Court. The testimony and evidence adduced by the Bank are in support of its amended return filed to the Order to Show Cause.

I find the following facts: .

That during the year 1910 the Directors of the Company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reincke; that the officers of the Company were: Chris Emille, President and General Manager; A. W. Reincke, Treasurer; Mrs. Jensine P. Emille, Secretary; L. F. Strong, Assistant Secretary.

That from the first day of November, 1910, until the adjudication of bankruptcy of the Company, J. A. Baptista was vice-president of the Company and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the Bank; [105] V. L. de Figueiredo, secretary and cashier;

and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the Company duly passed a resolution conferring on Chris Emille, the president of the Company, the powers of general manager of the Company, "with full and exclusive charge of the management and conduct of the affairs of the Company, with full power to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said Company"; that said resolution or authority conferred thereby was never cancelled or revoked by the Company (Ex. No. 4).

That on or about July 22, 1910, the Board of Public Works of the City entered into a contract with the Company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182 (Tr. p. 6); that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

"PAYMENTS.

In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the per-

formance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be [106] made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contract is not complying with the requirements of the contract and specifications."

The specifications annexed to the contract contain the following provision:

"No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto, unless

with like consent of the Board of Public Works."

That on or about the 30th day of July, 1910 (Tr. p. 18), this contract was sub-let by the Company of the complainant, Paul I. Welles. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was [107] completed by the complainant under the receivers and the trustee (Tr. pp. 18, 57).

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work on the contract done prior to December 1, 1910, and his estimate amounted to \$9,107.80. (Tr. p. 48.) This estimate was approved by the Board of Public Works of the City on December 5, 1910. (Tr. p. 9.) Said board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the Company was approved by the Board of Public Works, and the demand, so approved, was forwarded to the Board of Supervisors of the City. The said demand and estimate of the City Engineer are set out on pages 45 to 48 of the transcript.

That thereafter, on December 5, 1910, Chris

Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary called at the office of the bank; that they saw V. L. de Figueiredo, the secretary and cashier of the Bank, and Mr. Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the City in favor of the Company, and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows (Tr. 117 to 123):

“San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:— [108]

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the un-

dersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets under contract No. 31.

METROPOLIS CONSTRUCTION COMPANY, INC.

By CHRIS EMILLE,
President.

By L. F. STRONG,
Ass't. Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office Dec. 6, 1910.

Ans. H. J." [109]

That said warrant mentioned in said order for said fourth progress payment on said contract for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth

progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor (Tr. p. 117).

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon "Received Auditor's office Dec. 6, 1910. Ans. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth herein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68. [110]

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by

the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the President of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the Company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714. [111]

That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and authorized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order: That on and about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Co. for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. (Tr. p. 37.) On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof

was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11 o'clock and five minutes A. M., a petition was filed in this court praying that said [112] Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances (Tr. p. 123) on the same kind of paper (Tr. p. 106) having reference to the third progress demand on said Fourth and Kentucky contract (Tr. pp. 132, 133), and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto, who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payments upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were

made. (Tr. 133.) The cashier held an order empowering the Bank to draw the warrants in favor of the Company. (Exhibit 6.) The cashier received from the Auditor the paper demands for the third progress payments, such demands being in the name of the Metropolis Construction Co. when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Co. and for that reason Mr. Strong signed them. (Tr. p. 139.) Mr. de Figueiredo testified that the only thing the Auditor had was an order to deliver those orders to us (the Bank). [113] (Tr. p. 138, Ex. 6.) The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid (Tr. p. 124), but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by said board on January 3, 1911, and re-

ceived the approval of the Mayor of the City on January 4, 1911 (Tr. pp. 29, 38, 47½, 72); that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession.

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter governing the city during the year 1910.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof. (Tr. pp. 35, 36.)

On December 2, 1910 (Tr. p. 53) the Auditor received a letter from the Metropolis Construction Co., reading as follows: [114]

“San Francisco, Cal., December 2, 1910.

“To Thomas F. Boyle, City and County Auditor,
San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2,-990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed) METROPOLIS CONSTRUCTION
CO., INC.

CHRIS EMILLE, Pres.

“[Seal of the Corporation attached.]”

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit “D” These claims have

all been paid with the exception of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky contract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Co. on account of money loan to the Metropolis Construction Co. The said Central Trust Co. has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Co. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City, to the demand in controversy, and the City makes no [115] claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Co. (Tr. p. 471½.)

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

That on December 23d, 1910 (Tr. p. 56), the Court,

in the case of Metropolis Construction Co., Bankrupt, appointed three Receivers, John B. Daniel, A. B. Tognazzi, and Edmund F. Greene. These receivers immediately qualified and took possession of all of the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract (Tr. p. 56), continuing the work on this contract through the subcontractor, Mr. Paul I. Welles (Tr. p. 57).

Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910 (Tr. pp. 42, 43), the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Co. and purporting to revoke any powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, (Tr. p. 57), one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911 (Tr. p. 41), the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the

bankrupt by the City under any contracts entered into between [116] the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.

That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the trustee in bankruptcy. This final payment amounted to \$11,149.64. (Tr. pp. 49, 50). The demand for this amount was delivered by the Auditor to the defendant John Daniel, as trustee of the estate of bankrupt, and the proceeds thereof used in partial payment of the secured claim filed by Paul L. Welles in bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract on July 30th, 1910, with the Metropolis Construction Co. to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Co., and subsequently under the receivers and subsequently under the trustee, appointed by this Court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice (Tr. p 23) to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the Complaint. This notice was in the sum of \$8,500.00, and required the withholding of moneys due the Metropolis Construction Co., contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was

acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910 (Tr. p. 44); upon the Board of Public Works, December 12th, 1910 (Tr. p. 33); and upon the Board of Supervisors of the City, December 12th, 1910 (Tr. p. 55).

That on December 15th, 1910, complainant herein made an amended [117] notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910 (Tr. pp. 15-45); upon the Board of Public Works, December 16th, 1910 (Tr. pp. 16, 33, 34); and upon the City, December 19th, 1910, by service on the Mayor of the City (Tr. p. 16). It specifies the amount due the complainant as \$20,265.02. (Ex. "D" annexed to complaint, p. D6, lines 1-2).

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B" annexed to the Proof of Secured Debt, filed by Paul I. Welles in the bankruptcy proceedings. (Tr. pp. 15, 55, 44, 45, 33, 34, 58, 130.)

That the complainant (Tr. pp. 17, 18) filed his proof of secured debt in this court in the matter of Metropolis Construction Co., bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the trustee in bankruptcy

and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the trustee is \$13,010.26. (Tr. pp. 19-27.)

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05 (Tr. p. 19), upon the conditions named in the following paragraphs regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt (Tr. p. 20). The bankrupt has not been called upon to pay these notes (Tr. p. 20). It, however, [118] may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that, if Mr. Welles shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit: \$8,792.06 plus \$4,218.20 or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the trustee in bankruptcy, he would upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money

and thus release the Bankrupt (Tr. p. 135).

That on January 26, 1911, *mandamus* proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that complainant herein never made a request on the trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, [119] and is not a party thereto.

The costs in this proceeding are as follows:

Paid by complainant to reporter...\$ 72.30

Paid by defendant to reporter..... 61.30

Total.....\$133.60

The referee has not been paid for his services, and he respectfully requests the Court to fix his compensation. Those services consist of attendance in hearing of the case, five days, and the preparation of this report.

ARMAND B. KREFT,
Referee in Bankruptcy.

Dated San Francisco, October 13, 1911.

Filed Oct. 14, 1911, at 11 o'clock and 20 min. A. M.

[120]

[Title of Court and Cause.]

**Replication [to Answer of Portuguese-American
Bank of San Francisco].**

**REPLICATION OF PAUL I. WELLES, COM-
PLAINANT, TO THE ANSWER OF PORTU-
GUESE-AMERICAN BANK OF SAN FRAN-
CISCO, DEFENDANT.**

This replicant, Paul I. Welles, saving and reserv-
ing to himself all and all manner of advantages
of exception which may be had and taken to the
manifold errors, uncertainties and insufficiencies
of the answer of the defendant, Portuguese-Ameri-
can Bank of San Francisco, a corporation, for rep-
lication thereunto saith that he doth and will aver,
maintain, and prove his said bill to be true, cer-
tain, and sufficient in the law to be answered unto
by the said defendant, and that the answer of the
said defendant is very uncertain, evasive and in-
sufficient in law to be replied unto by this replicant;
without this, that any other matter or thing in the
said answer contained, material or effectual in the
law to be replied unto, and not herein and hereby
well and sufficiently replied unto, confessed, or
avoided, traversed or denied, is true; all which mat-
ters [121] and things this replicant is ready to
aver, maintain, and prove as this Honorable Court

shall direct and humbly prays as in and by his said bill he hath already prayed.

October 16th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of the within Replication this 16th day of October, 1911, is admitted.

JAMES B. FEEHAN,

Attorney for Defendant, Portuguese-American Bank of San Francisco.

Filed Oct. 16, 1911. [122]

[Replication to Answer of John Daniel, Trustee, etc.]

[Title of Court and Cause.]

REPLICATION OF PAUL I. WELLES, COMPLAINANT, TO THE ANSWER OF JOHN DANIEL, TRUSTEE OF THE ESTATE OF METROPOLIS CONSTRUCTION COMPANY, A CORPORATION, BANKRUPT, DEFENDANT.

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain,

evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant [123] is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

October 19th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Due service and receipt of the within Replication is hereby admitted this 19th day of October, 1911.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

M. J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant.

Filed Oct. 25, 1911. [124]

[Title of Court and Cause.]

**Memorandum Opinion Confirming Report of
Referee, etc.**

There does not seem to be any objection to the report and findings of the referee, and said report is confirmed, and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded

in the bill of complaint, and to its costs and disbursements herein.

This is not a proceeding in bankruptcy, but an independent suit in equity, and I find that the referee is entitled to be paid, as compensation for his services in this action, the sum of \$60.00.

LET A DECREE BE ENTERED IN ACCORDANCE WITH THIS MEMORANDUM.

Dated December 12th, 1911.

JOHN J. DE HAVEN,
Judge.

Filed Dec. 12, 1911. [125]

**[Order Confirming Report and Findings of Referee,
etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of December, in the year of our Lord one thousand nine hundred and eleven.
Present: The Honorable JOHN J. DE HAVEN.

#15,148.

PAUL I. WELLES

vs.

JOHN DANIEL, Trustee, etc., et al.

This case having been heretofore submitted to the Court for determination, the Court now files its written memorandum, and by the Court ordered that the report and findings of the referee be, and the same is hereby confirmed; further ordered that complain-

ant is entitled to the relief demanded in the bill of complaint, costs and disbursements herein.

Further ordered that the special referee be, and he is hereby allowed \$60 for his services herein.

Further ordered that a decree be entered accordingly. [126]

[Title of Court and Cause.]

Order [Confirming Report of Referee Granting Complainant an Injunction Pendente Lite, etc].

Upon reading and filing the Order to Show Cause, made April 19, 1911, herein, the pleadings of the parties, and the findings and report of the referee, and after considering the briefs and arguments of counsel, it is

ORDERED that the said report of the referee herein be and the same is hereby confirmed and the referee is allowed sixty dollars for his compensation, one-half to be paid by complainant and one-half by defendant bank; and it is further

ORDERED that the complainant be and he is granted an injunction *pendente lite* restraining the defendant bank from prosecuting its mandamus proceeding referred to in said order to show cause, made April 19th, 1911, herein; and it is further

ORDERED that a writ of mandate issue requiring and directing the defendant, Thomas F. Boyle, to allow and approve the demand, to wit: The fourth progressive payment, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) dollars, mentioned in the bill of com-

plaint, as [127] amended herein, and to deliver the same to defendant, John Daniel, as Trustee, herein, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; and it is further

ORDERED that the complainant file a bond or undertaking upon the issuance of the said injunction in the penal sum of Eight Thousand Dollars.

JOHN J. DE HAVEN,
District Judge.

Dated December 13th, 1911.

Filed Dec. 13, 1911. [128]

[Title of Court and Cause.]

Writ.

(Injunction and Mandamus.)

The President of the United States of America, to Portuguese-American Bank of San Francisco, a Corporation, Defendant, and to Thomas F. Boyle, Defendant, and to Their, and Each of Their, Attorneys, Servants, and Agents, Greeting:

WHEREAS: It has been represented to us in our District Court of the United States for the Northern District of California, in the Ninth Circuit, on the part of Paul I. Welles, complainant, that he has lately exhibited his Bill of Complaint as amended, in our said District Court against you, the defendants above named, and John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, touching the matters, therein, complained of; and our said Court having

thereupon, in this cause, ordered that said defendants show cause, [129] if any they have, at a time and place in said order specified, why the relief, prayed for in said Bill of Complaint, should not be granted, and said defendants having made return to said order and having appeared herein, by their respective counsel; and, thereupon, said matter having been fully heard upon said Bill of Complaint, as amended, said returns of said defendants, and upon the report of the Referee to whom said matter was referred for the purpose of taking evidence and finding facts herein, and upon the briefs and arguments of counsel; and upon the pleadings.

Now, therefore, we do strictly command and enjoin you, the said Portuguese-American Bank of San Francisco, a corporation, your attorneys, servants and agents, under the pains and penalties which may fall upon you, and each of you; in case of disobedience, that you desist and refrain from prosecuting, concerning the demand and proceeds hereinafter mentioned, that certain proceeding, mentioned in said Order to Show Cause, herein, made April 19, 1911, commenced January 26th, 1911, in the Superior Court of the State of California, in and for the City and County of San Francisco, by a petition filed in said Superior Court on the said last mentioned day, being numbered 33,836 in the records and files of said Superior Court, and now pending therein; which commands and injunctions, you are required to observe and obey, until said District Court shall make further order in the premises;

And we do strictly command, require and direct

you the said Thomas F. Boyle, to allow and approve that certain demand, to wit, for the fourth progressive payment on that certain contract, known as the Fourth and Kentucky Street contract, between the City and County of San Francisco, a municipal corporation and Metropolis [130] Construction Company, a corporation, bankrupt, mentioned in the Bill of Complaint, herein as amended, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, now held by you; and that you then immediately deliver said demand to John Daniel, defendant, herein, as Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; which command, requirement, and direction you are required to observe and obey under the pains and penalties which may fall upon you, in case of disobedience.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, the 15th day of December, Nineteen Hundred Eleven, and of the Independence of the United States of America the 136th year.

JAS. P. BROWN,

Clerk.

By Francis Krull,
Deputy Clerk. [131]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Injunction and Mandamus on the therein named Thomas F. Boyle by handing to and leaving an attested copy thereof with Thomas F. Boyle personally at San Francisco in said District on the 15th day of December, A. D. 1911.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,
Deputy.

Filed Dec. 18, 1911. [132]

[Title of Court and Cause.]

Order of Reference for Final Hearing.

ORDERED, that this case be referred to A. B. Kreft, Referee, on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court.

Dated December 26, 1911.

JOHN J. DE HAVEN,

Judge.

Filed Dec. 26, 1911. [133]

[Order Referring Cause to Referee to Hear Testimony and Proofs, to Find Facts upon Issues Arising on Pleadings and to Report Findings and Conclusions.]

[Title of Court and Cause.]

On motion of C. A. S. Frost, Esqr., C. B. Feehan, Esqr., attorney for defendant Portuguese-American Bank, being present and making no objection, the Court made and filed its order referring this cause to A. B. Kreft, Referee, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court. [134]

[Report of Referee, Filed March 8, 1912.]

[Title of Court and Cause.]

To the Honorable, the Judges of the District Court of the United States, Northern District of California:

The undersigned, Referee in Bankruptcy, to whom, on the 26th day of December, 1911, was referred the above-entitled cause "on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings and report his findings and conclusions to this Court," respectfully reports as follows:

That said matter was regularly set for hearing on the 9th day of January, 1912, on which day I was attended upon by C. A. S. Frost, Esq., attorney for complainant, by Milton J. Green, Esq., attorney

for trustee, and by James G. Feehan, Esq., and Charles J. Heggerty, Esq., attorneys for defendant Portuguese-American Bank. No appearance was made on behalf of defendant Thomas F. Boyle.

At the commencement of the hearing herein counsel for defendant bank stated of record that said bank "specially appears, without [135] consenting to the jurisdiction of the referee or to the jurisdiction of the court over the Portuguese-American Bank or its rights or property interests, and protests against and objects to the jurisdiction of the referee to hear or determine any matters or proceedings involving the issues raised by the complaint or bill and the answer thereto, as also to the jurisdiction of the District Court of the United States to determine the same."

The question was raised as to whether the findings of fact made by the undersigned referee upon the reference herein to him "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to the court," which report was filed October 14, 1911, and confirmed by the Court, are *res adjudicata* as to the facts found. The referee held that the confirmation of such findings by the Court was *res adjudicata* where the issues raised by the answer of the bank herein are the same as the issues raised upon the order to show cause and pleadings, before the referee at the time of making said report, but that on the present hearing the parties might introduce evidence as to any new issues raised by the answer of the bank. The answer of the bank was filed October

6, 1911, before the report of the referee was filed, but such answer was not before the referee upon the former hearing.

After some discussion it was stipulated that the whole record of the former hearing should be admitted in evidence upon this hearing (Tr. pp. 7 and 8); such admission being limited on the part of complainant to the use of such record upon any issue presented by the answer of the bank not raised upon the hearing of the order to show cause.

In addition to such record certain stipulations were made and certain documentary evidence was referred to. Counsel for the [136] bank read in evidence a portion of the contract between the Metropolis Construction Company and the City and County of San Francisco, under the heading "Sub-Contracts," which is set out in the transcript filed herewith, page 8. Such contract was put in evidence upon the former hearing.

It was stipulated "that the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now a legally created and existing banking corporation, doing business as such in the City and County of San Francisco" (Tr. p. 8); and "that the charter of the City and County of San Francisco, as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action desires to refer to and use, may be referred to and used as evidence." (Tr. p. 8.) Counsel for the bank also put in evidence that portion of such

city charter as is quoted on page 8 of its answer, lines 13 to 25. (Tr. p. 9.) The complainant made the following admission: "That there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, 'Paul I. Welles,' as the sub-contractor on the job." (Tr. p. 9.)

It was admitted that the United Railroads, on January 4, 1912, filed a claim in the bankruptcy proceedings of the Metropolis Construction Company. The referee finds that this claim is based upon the claim referred to as the claim of the United [137] Railroads in the findings of fact heretofore made by the referee.

No additional facts other than those embraced in the admissions and as stated in this report have been elicited; and the referee finds the facts upon the issues arising upon the pleadings to be as reported by him in his former report, together with the additional facts set out in this report.

The matter was submitted on briefs, and the final brief was filed on February 28, 1912, at which time the respective parties and the referee were acting upon the assumption that the present order of reference required the referee to report his conclusions upon all the issues raised by the answer of the

bank. In the memorandum of opinion of the Court herein, filed December 12, 1911, the Court says: "There does not seem to be any objection to the report and findings of the referee, and said report is confirmed and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint, and to its costs and disbursements herein."

Having considered the matter and having examined all the records and papers in the case, the referee is of the opinion that the additional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the Court in its said memorandum of opinion. Treating the confirmation of the referee's report on the former hearing as *res adjudicata* as to the facts found, it follows that if the complainant was entitled to the relief prayed for upon such facts, he is entitled to such relief upon the record as now presented.

The referee notified the respective counsel of complainant and [138] defendant bank of this conclusion and was attended upon by them on March 4, at which time the scope of this reference was discussed; and the referee finally determined to send up this report, setting forth the conclusion reached by him, and ask the Court for its instructions as to further proceedings, if any.

The costs of this proceeding are as follows:

Paid by complainant to reporter....\$8.00

Paid by defendant to reporter.....\$8.00

Total.....\$16.00

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy.

Dated San Francisco, March 9, 1912.

Papers transmitted herewith:

Transcript of proceedings on this reference;

Objection of Portuguese-American Bank of San Francisco to referee making and reporting conclusions of law;

Brief of defendant bank on final hearing;

Complainant's final brief;

Reply brief of defendant bank.

Filed Mar. 8, 1912. [139]

[Title of Court and Cause.]

Exceptions of Defendant Portuguese-American Bank of San Francisco to Referee's Report on Final Hearing.

The defendant Portuguese-American Bank of San Francisco, excepts to the report of Hon. Armand B. Kreft, to whom this cause was referred on final hearing by order of this Court made and entered on the 26th day of December, 1911, on the following grounds:

First: For that said Referee has not reported his findings or conclusions to this Court, as required by said order of reference.

Second: For that said Referee has not reported therein any findings or conclusions upon which a proper decree in this cause can be based.

Third: For that said Referee has treated the confirmation of his former report on the hearing of the order to show cause herein, as *res adjudicata*, as to the facts and the relief, and [140] has erred in so treating said order of confirmation.

Fourth: For that said Referee has treated the order confirming his former report as an opinion of the Judge of this Court, that upon the facts set forth in said report that the complainant was entitled to the relief prayed for in his bill of complaint. That said Referee has erred in so treating said order, for the only matter then before the Court, wherein this Bank was concerned, was whether the relief set out in the order to show cause should be granted, *prior* to the determination of the action upon the merits.

Fifth: For that said Referee at page 2 of said Report finds that the stipulation for the admission of the whole record on the former hearing, in evidence on this hearing, was "limited on the part of the complainant to the use of such record upon any issue presented by the answer of the Bank not raised upon the hearing of the order to show cause"; whereas, he should have found that it was stipulated that all the evidence, testimony, proceedings, stipulations, exhibits and the whole record, in the former hearing, be considered as evidence on this hearing, with the same force and effect as if repeated here, subject to the objection of complainant that the

Court has not now the right to take further testimony upon the issues embraced in the report of the Referee on said former hearing.

This defendant respectfully requests that this cause be rereferred to said Referee to report his findings and conclusions to this Court, as required by said Order by Reference.

KNIGHT & HEGGERTY,
JAMES B. FEEHAN,
Solicitors for Said Defendant.

April 6th, 1912. [141]

Filed Apr. 6, 1912. [142]

[Title of Court and Cause.]

Order Allowing Amendment to Prayer of Bill of Complaint.

On motion of complainant, there being no objection made, it is

ORDERED that complainant be and he is hereby permitted to make, serve and file herein, his amendment, dated February 23d, 1912, to the Prayer of his Bill of Complaint herein; and that said Bill of Complaint be amended accordingly.

Dated April 15, 1912.

JOHN J. DE HAVEN,
Judge.

Filed Apr. 15, 1912. [143]

[Order Referring Cause to Special Referee and Examiner to Report Facts, and Granting Motion to Amend Complaint.]

[Title of Court and Cause.]

The exceptions of defendant Portuguese-American Bank of San Francisco to the referee's report on final hearing herein, and the motion for leave to amend the bill of complaint herein, this day came on for hearing, Charles J. Heggerty, Esqr., and James B. Feehan, Esqr., appearing for said defendant, and C. A. S. Frost, Esqr., appearing for complainant;

After hearing counsel for respective parties, by the Court ordered that this cause be, and the same is hereby referred to A. B. Kreft, Esqr., as Special Referee and Examiner, to ascertain and report the facts on his conclusions of law therefrom, on the testimony taken and on file herein, on the issues joined, without any reference to the findings and report upon which a preliminary injunction was based.

Further ordered that said motion to amend the bill of complaint be, and the same is hereby granted.
[144]

[Title of Court and Cause.]

Amendment to Prayer of Bill of Complaint.

Comes now the complainant, Paul I. Welles, and, by leave of Court thereunto, first had and obtained, makes and files the following amendment to the prayer of his Bill of Complaint in the above-entitled

action, now on file, and amends said prayer so as to read as follows, that is to say:

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant trustee, said Demand for Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee, on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this Court, to make answer hereunto and to assert herein its claim, if any it have, upon said demand, and to abide [145] the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants, be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained.

1. That complainant is a creditor, holding security of the estate of Metropolis Construction Co., a bankrupt, according to the tenor of a certain order, allowing said claim and security, given and made in the matter of said bankrupt, pending in this court, numbered 6827, on the 13th day of April, 1911; and

2. That complainant, as such creditor, is entitled to payment in the course of administration of said bankrupt estate, out of any moneys, received by, or in possession of, the defendant, John Daniel, Trustee of the Estate of said bankrupt, from the City and County of San Francisco, State of California, as payment to the said bankrupt on account of that certain contract for the construction of sewers and appurtenances, in said City and County of San Francisco, known as the Fourth and Kentucky Street contract, number 6A; and

3. That complainant is entitled to payment out of the funds derived from said Fourth and Kentucky Street contract prior in order of payment, and in preference, to defendant Portuguese-American Bank of San Francisco, a corporation; and

4. That complainant be, and he is, granted a permanent [146] injunction against defendant, Portuguese-American Bank of San Francisco, a corporation, its officers, agents and attorneys, that it and they be perpetually enjoined from prosecuting, or in any manner proceeding with that certain action or proceeding wherein said banking corporation is plaintiff, and defendant herein, Thomas F. Boyle, auditor of the City and County of San Francisco, is defendant, commenced and filed January 26, 1911, in the Superior Court of the City and County of San Francisco, State of California, and numbered 33,836 in the records and files of said Superior Court; in so far as said action numbered 33,836 may, or does, concern a payment, or the demand therefor, or evidence thereof, known as the "fourth progress" pay-

ment alleged to be due Metropolis Construction Company, a corporation, on account of contract No. 6A, for the construction of sewers and appurtenances in Fourth and Kentucky Streets, San Francisco, California; and

5. Judgment against said defendant, Portuguese-American Bank of San Francisco, for complainant's costs and disbursements to be taxed.

And for such other and further relief as may be according to equity, and for his costs and disbursements herein.

PAUL I. WELLES,
Complainant.

C. A. S. FROST,

Solicitor for Complainant. [147]

[Duly verified February 23, 1913.] [148]

[Title of Court and Cause.]

**Stipulation [That Amendment may be Made to
Prayer of Complaint].**

The foregoing amendment may be made and filed;
all rights of defendant bank being reserved.

Attorney for Defendant, Portuguese-American
Bank of San Francisco.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for Defendant, John Daniel, Trustee.

EDWARD F. MORAN,

Attorney for Defendant, Thomas F. Boyle. [149]

Receipt of a copy of within Amendment this 15th day of April, 1912, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

Attorney for Thos. F. Boyle, Defendant.

Filed Apr. 16, 1912. [150]

[Title of Court and Cause.]

Report of Referee [Filed July 16, 1912].

To the Honorable, the Judges of the District Court of the United States in and for the Northern District of California:

The undersigned, Referee in Bankruptcy, to whom on the 15th day of April, 1912, this cause was referred as special referee and examiner, to ascertain and report the facts and his conclusions of law therefrom, on the testimony taken and on file herein on the issues joined, "without any reference to the findings and report upon which a preliminary injunction was based," respectfully certifies and reports:

This cause was submitted to the referee upon the record as made upon the order to show cause and upon the previous reference to the referee to make

findings of fact upon the issues arising upon the pleading, and report his findings and conclusions to this Court, dated December 26, 1911; no additional evidence being introduced under the reference of April 15, 1912.

The appearances before me were C. A. S. Frost, Esq., attorney for complainant; James B. Feehan, Esq., and Charles J. Heggerty, [151] Esq., attorneys for defendant, Portuguese-American Bank; Milton J. Green, Esq., attorney for John Daniel, trustee. No appearance was made on behalf of defendant Thomas F. Boyle upon the present reference.

For convenience of reference John Daniel will hereinafter be referred to as the Trustee, the Metropolis Construction Company as the Company, the Portuguese-American Bank as the Bank, Thomas F. Boyle, Auditor of the City and County of San Francisco, as the Auditor.

Counsel for the bank announced that the bank reserved its objection and exception to the jurisdiction of the Court. The pleadings before the referee are the bill of complaint as amended, the answer of Auditor Boyle and answer of John Daniel, trustee, and the answer of the Portuguese-American Bank. Upon the issues joined I find the following facts:

That the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco; that John Daniel is a duly qualified and acting trustee of the estate of the Metropolis Con-

struction Company, bankrupt, No. 6827, pending in this court; that complainant, Paul I. Welles, is a citizen of the United States and of the State of California and a resident of Berkeley, in the northern district of said State; that Thomas F. Boyle, defendant herein, at all times mentioned in the complaint, continuously, has been the duly elected, qualified and acting auditor of the City and County of San Francisco; that the Metropolis Construction Company was at all times mentioned in the bill of complaint a corporation organized and existing under and by virtue of the laws of the State of California; that during the year 1910 the [152] directors of the company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reinicke; that the officers of the company were Chris Emille, president and general manager; A. W. Reinicke, treasurer; Mrs. Jensine P. Emille, secretary; L. F. Strong, assistant secretary.

That from the 1st day of November, 1910, until the adjudication of bankruptcy of the company, J. A. Baptista was vice-president of the company, and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the bank; V. L. de Figueiredo, secretary and cashier; and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the company duly passed a resolution conferring on Chris Emille, the president of the company, the powers of general manager of the company, "with full and exclusive charge of the management and conduct of the affairs of the company, with full power

to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said company"; that said resolution or authority conferred thereby was never cancelled or revoked by the company.

That on or about July 22, 1910, the Board of Public Works of the city entered into a contract with the company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182; that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

"PAYMENTS.

"In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of [153] each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

"The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into

the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

"Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

"Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

The specifications annexed to the contract contain the following provision: [154]

"**SUB-CONTRACT:** The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

"With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of

the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

"No sub-contractor will be considered unless the original contractor between the contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

"No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."

That on or about the 30th day of July, 1910, this contract was sub-let by the company to the complainant, Paul I. Welles; that [155] there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Company to Paul I. Welles; that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector of the job, all the time, openly and without any concealment; that he had his name in the telephone book and he had

his sign "Paul I. Welles" as sub-contractor on the job. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was completed by the complainant under the receivers and trustee.

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work of the contract, and prior to December 1, 1910, and his estimate amounted to \$9,107.80. This estimate was approved by the Board of Public Works of the City on December 5, 1910. Said Board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the company was approved by the Board of Public Works, and the demand so approved, was forwarded to the Board of Supervisors of the City. The said demand and said estimate of the City Engineer are set out on pages 45 to 48 on the transcript marked "Filed October 14, 1911."

That thereafter, on December 5, 1910, Chris Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary, called at the office of the Bank; that they saw V. L. de Figueiredo,

[156] the secretary and cashier of the Bank, and Chris Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the city in favor of the Company and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the Bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows:

"San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being

fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned [157] and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

METROPOLIS CONSTRUCTION COMPANY, INC.

By CHRIS EMILLE,
President.

By L. F. STRONG,
Ass't Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office. Dec. 6, 1910.

Ans. H. J."

That said warrant mentioned in said order for said fourth progress payment on said *construct* for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the

impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor.

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon, [158] "Received Auditor's Office Dec. 6, 1910. Ana. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank, he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68.

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, ac-

accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before, and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the president of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 [159] was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714.

That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and author-

ized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order; that on or about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Company for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of [160] Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the Bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11

o'clock and five minutes A. M., a petition was filed in this court praying that said Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances on the same kind of paper, having reference to the third progress demand on said Fourth and Kentucky contract, and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto; who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payment upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the Company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's [101] office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were made. The cashier held an order empowering the Bank to draw the warrants in favor of the Company. The cashier received from the Auditor the paper demands for the third progressive payments,

such demands being made in the name of the Metropolis Construction Company when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Company. The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid, but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by the Board on January 3, 1911, and received the approval of the Mayor of the City on January 4, 1911; that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession. [162]

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter govern-

ing the City during the *City during the year 1910*. The quotations on page 8 of the answer of the Bank, lines 13 to 25, are provisions of the City charter.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof.

On December 2, 1910, the Auditor received a letter from the Metropolis Construction Company, reading as follows:

“San Francisco, Cal., December 2, 1910.

To Thomas F. Boyle, City and County Auditor, San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed) METROPOLIS CONSTRUCTION CO.,
INC.

CHRIS EMILLE,

Pres.

[Seal of the corporation attached.]”

The United Railroads on January 4, 1912, filed with the referee in the bankruptcy proceedings of the Company, a claim based upon the application which is the subject of this order.

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit “D.” These claims have all been paid with the exception of that of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky con-

tract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never [163] ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Company on account of money loaned to the Metropolis Construction Company. The said Central Trust Company has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Company. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City to the demand in controversy, and the City makes no claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Company.

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

On December 23d, 1910, the Court, in the case of Metropolis Construction Company, bankrupt, appointed three receivers: John B. Daniel, A. B. Tognazzi and Edmund F. Greene. These receivers im-

mediately qualified and took possession of all the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract, continuing the work on this contract through the sub-contractor, Mr. Paul I. Welles. Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910, the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Company, and purporting to revoke any [164] powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911, the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the bankrupt by the City under any contracts entered into between the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.

That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the Trustee in bankruptcy. This final payment amounted to \$11,149.64. The demand for this amount was delivered by the Auditor to the defendant John Daniel, as Trustee of the estate of the bankrupt, and the proceeds thereof were used in partial payment of the secured claim filed by Paul I. Welles in the bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract, on July 30th, 1910, with the Metropolis Construction Company to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Company, and subsequently under the receivers, and subsequently under the Trustee appointed by this court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the complaint. This notice was in the sum of \$8,500, and required the withholding of [165] moneys due the Metropolis Construction Company, contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910; upon the Board of Public Works, December 12th, 1910; and upon the Board

of Supervisors of the City, December 12th, 1910.

That on December 15th, 1910, complainant herein made an amended notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910; upon the Board of Public Works, December 16th, 1910; and upon the City, December 19th, 1910, by service on the Mayor of the City. It specifies the amount due the complainant as \$20,265.02.

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B," annexed to the Proof of Secured Debt filed by Paul I. Welles in the bankruptcy proceedings.

That the complainant filed his proof of secured debt in this court in the matter of Metropolis Construction Company, bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the Trustee in bankruptcy and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the Trustee is \$13,010.26. [100]

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05, upon the conditions named in the follow-

ing paragraph regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt. The bankrupt has not been called upon to pay these notes. It, however, may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that if Mr. Wells shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit, \$8,792.06, plus \$4,218.20, or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the Trustee in bankruptcy, he would, upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money and thus release the bankrupt.

That on January 26, 1911, mandamus proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that

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complainant herein never made a request on the [107] Trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by the process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, and is not a party thereto.

CONCLUSIONS.

There are two main questions presented.

First, whether the fourth progressive payment in question was due to the Company and was the proper subject of an assignment when the alleged assignment to the Bank was made.

Second, does the evidence show that an assignment thereof took place?

The contract between the City and the Company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the City. The consent of the City was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the City, and can only be invoked by the City. This point is covered by defendant's brief, page 6, filed February 2, 1912.

On December 5, 1910, the Board of Public Works authorized the fourth progressive payment to be made to the Company. After such authorization, and on December 6th, 1910, the Bank made its loan

of \$30,000, and for which it claims it was given an assignment of demand against the city aggregating about \$38,000. \$5,000 additional upon the same assignment was loaned on December 7th, 1910. The fourth progress demand was approved by the Board of Supervisors on January 3, 1911, and by the Mayor of the City on January 4, [166] 1911. The notices to withhold were made by complainant Welles on December 10, 1910, and December 15, 1910.

Complainant claims that the fourth progress payment did not become due until approved by the Board of Supervisors, and that Welles, having given his notices to withhold before such approval, has a prior right to the fund. (Complainant's Brief, page 29.)

The Bank claims that the payment was due when the demand was approved by the Board of Public Works.

Both parties claim to be sustained in their contentions by the case of Newport Wharf & Lumber Company against Drew, 125 Cal. 585.

This case, it seems to me, covers the law upon three points of this branch:

First, a notice to withhold is equivalent to a garnishment of the moneys then due or to become due to the contractor;

Second, an assignment of a payment may not be made before the payment is due;

Third, an assignment after a payment is due takes precedence over a subsequent notice to withhold. This case involved the assignment of progressive payments under a contract with the board of trustees of a State asylum. For the purpose of determining

the amount of the progressive payments, the contract provided that the Superintendent of Construction should make certain estimates of work done. A certificate showing the labor performed and materials furnished was prepared in the form of a bill of account on behalf of the contractor, with the approval of the Superintendent of Construction endorsed thereon, and was then presented to the board of trustees for allowance and order for payment. Upon the allowance and order for payment of this bill a warrant was drawn by the State Controller in favor of the trustees for payment of the amount found due, and delivered to [169] them. At page 589 the Court say:

"The provision in the contract for the payment of 90 per cent of the value of materials used and labor performed as the work progresses, with the condition that before any payment should be made, the Superintendent of Construction should, not oftener than once a month, furnish an 'estimate' of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the acceptance of the work by the trustees. The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obliga-

tion of the State which had been created in favor of the contractors by the trustees, became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition."

The contract in the case at bar is in terms between the Company and the Board of Public Works, but has been referred to herein by me as a contract with the City, and provides that the work shall be done "under the direction and satisfaction of said Board of Public Works," and, "the said Board of Public Works in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, the Company for the work aforesaid. Following which is set out the prices fixed for the work. [170]

The contract then refers to the progressive payments for in the specifications annexed to and a part of the contract. Said specifications provide:

"That the City Engineer shall on or about the first day of each month make an estimate of the value of the labor done and the materials incorporated in the work. Upon each estimate being made the City shall pay or cause to be paid to the contractor in the manner provided by law an amount equal to 75 per cent of said City Engineer's estimate."

The charter of the City, Article 2, Chapter 1, Section 19, provides that all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the City Treasurer, be first ap-

proved by the Board of Supervisors; all demands for more than \$200 shall be presented to the Mayor for his approval in the manner hereinbefore provided for the passage of bills or resolutions.

Article 3, Chapter 1, Section 15, provides that the supervisors shall authorize the disbursements of all public moneys except as otherwise specially provided in this chapter.

Counsel for complainant (Brief, page 27) contends that the Board of Public Works is a mere adjunct to the Board of Supervisors, merely a superintendent of streets, referring to Article 6, Chapter 1, Section 7, of the Charter: "The Board (of Public Works) shall be successor in office and shall have all the powers and perform all the duties of the superintendent of streets" et cetera; and counsel contends that the Board of Public Works is on a par, so far as authority is concerned, with the superintendent mentioned in the case of Newport News Company vs. Drew, who approved the demand in that case when they initiated, and that the trustees mentioned in the Drew case constituted [171] the Board having the final right to approve payments under the contract, which like right resides in the Board of Supervisors, and that in both cases the demands are subject to a further audit before the final payment, but that the indebtedness is created and fixed by the approval and passage by the Board of Trustees, in the one case, and by the Board of Supervisors in the other; that the Board of Public Works can oversee, initiate, protect, but cannot make an obligation to pay money.

I do not agree with counsel in this contention that the Board of Supervisors corresponds with the Board of Trustees in the Drew case, as the body whose approval was necessary before the progressive payments became due.

It will be noted that the contract is between the Company and the Board of Public Works, which Board, under the charter, is empowered to make such contracts on behalf of the City, and that the work is to be done under the direction and to the satisfaction of such Board, and said Board contracts and agrees that the City will pay in the manner provided by law for such work. The Board of Public Works and not the Board of Supervisors fixes the amount of the progress payments.

The resolution allowing the fourth progress payment reads:

“Resolved, that the Metropolis Construction Company be and is hereby allowed the sum of six thousand eight hundred and thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street. Passed by the following vote: Ayes: Commissioners Newsom, Laumeister and Casey.

BOARD OF PUBLIC WORKS.

December 5, 1910.

Passed.” [172]

The specifications provide that the City Engineer shall make the estimates of work done; and if a parallel is drawn with the Drew case, he, in my opinion, would correspond to the superintendent of con-

struction therein mentioned, who endorsed his approval upon the bill of contractor, and which bill was ordered paid by the Board of Trustees. In like manner the Board of Public Works fixed and allowed the progressive payments upon the estimates of the City Engineer.

The contract provides that on the fulfillment of its covenants (which are the performance in a workmanlike manner, to the satisfaction of the Board of Public Works, of the work contracted), the City will pay or cause to be paid in the manner provided by law the payment provided in the contract, and progress payments provided in the specifications. The Board of Public Works is the body to determine when the company is entitled to these progress payments and to advise the supervisors that the payment is due, which latter body provides for the payment of the money. The steps required, after the amount is found due the contractor by the Board of Public Works as aforesaid, are the steps of payment in the manner provided by law, to wit: The order of the supervisors on the Auditor to draw the warrant and the payment of the warrant by the City Treasurer.

In the Drew case the Court further said, referring to the time when the demand was subject to assignment:

“The provision in the contract for payment of the contract price in controller’s warrants on the state treasury did not affect this power of disposition, or right to immediate payment or suspend its exercise until such warrant should be obtained. The failure

or neglect to obtain a warrant immediately upon the approval of the estimates would have no greater effect than a similar [173] failure on the part of the contractor in the case of an ordinary completed contract, to obtain a check from the owner immediately upon receiving the architect's certificate that the installment is payable."

For the foregoing reasons I am of the opinion that the fourth progressive payment became due the Company on the 5th day of December, 1910, when approved by the Board of Public Works, and that the Company had a vested right therein, which was assignable, and that if an assignment was in fact made to the Bank, the Bank is entitled to the moneys payable under the demand, notwithstanding the notices to withhold, made by Welles.

Counsel for complainant claims that the order given by the Company to the Bank, addressed to the Auditor, and the facts and circumstances attending the transaction, and the conduct of the parties relating thereto, do not give rise to an assignment to the Bank of the fourth progress payment in question. The order reads as follows:

"Thomas F. Boyle,

Auditor of the City and County of San Francisco.

Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contract hereinafter set forth, to wit:

1st. Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903." [174]

Which is the warrant in question? The order specifies other warrants, the total of warrants assigned aggregating \$38,171.32.

Counsel for complainant refers to the testimony of Mr. de Figueiredo, cashier of the Bank, quoting as follows: "The warrants were made out in the name of the Metropolis Construction Company, and the Auditor, the only thing that he had was an order to deliver those orders to us, although our name did not appear on the warrants, only on the order. Therefore, Mr. Strong signed them." The Mr. Strong referred to was the assistant secretary of the Company. Mr. de Figueiredo further testified in the same connection that "Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion."

This testimony related to a previous order given to the Bank upon a previous loan, and which order was in substantially the same words as the order in question, and complainant was permitted to show the conduct of the parties regarding such previous order for the purpose of showing the intention of the parties in regard to the warrant in question.

It further appears that on such previous order, when the warrant was ready for delivery, the cashier of the Bank and Mr. Strong went to the Auditor's

office and the warrant was delivered by the Auditor to the cashier; they then went to the treasurer's office and Mr. Strong, assistant secretary of the Company, endorsed the warrant and the money was turned over to the cashier, who took the same to the Bank.

The testimony shows that when the officers of the Bank were approached for the loan of \$30,000, Mr. Emille, president of the corporation, stated that as security for the loan they would give the Bank an assignment of certain demands, including said fourth progress demand. The officers of the Company and the officers of [175] the Bank all testify that an assignment of the said progress demands was intended. However it is a fair inference from the testimony that it was intended by the parties that the method followed on the previous transaction would be followed upon the collection of said demands, that is, that when the warrant was ready for delivery some officer of the Company would endorse the same in the same manner as upon the previous loan. I am satisfied from the evidence that the Bank did not intend to lend money without security, and that the Company offered as security to assign this demand. The security given the Bank by the Company was for a present consideration, and if I am right in my holding, that the payment was due the Company from the City, the claim, therefore, was property which the Company could rightfully assign. I am of opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the Auditor was

intended; that it was not the intention of the Company to reserve any right for its own use or benefit or at all, either to revoke the order on the Auditor or to collect the money.

The language used by the United States Supreme Court in the case of *Fourth Street National Bank vs. Yardley*, 165 U. S. 634, on commenting on the facts in that case, I deem appropriate to the facts in the case at bar. This is a leading case, involving the doctrine of equitable assignment and held, quoting from the syllabi:

"While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of the specific fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice." [176]

With respect to the facts, the Court uses the following language:

"It could not be reasonable conceived that the loan would be made without reference to the assignment of the fund from which alone the hope of immediate payment was to be reasonably expected. . . . The transaction, therefore, was a proposition to borrow on the one hand, accompanied by the disclosure that security was necessary, and tendering the security, and on the other hand, an acceptance of such proposal and an advance made on the face of it."

The position of counsel for complainant is that said order on the Auditor, containing no words of conveyance, and it being necessary for an officer of the company to endorse the warrant before the same could be collected, the Company had not parted with control, and that no assignment of said demand has taken place.

Counsel for the Bank state in their brief that the Bank relies entirely upon its claim of assignment; that if it has not an assignment it has nothing. Many cases are cited. The counsel for complainant refers particularly to the case of *Christmas vs. Russell*, 14 Wallace, 69, 20 Law Edition, 762, in which the Supreme Court say:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, no authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignment. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Counsel also refers to the case of the *Commercial National Bank vs. the City of Portland*, 37 Oregon, 33, a decision by Judge Bean, in which case the Court say: [177]

"An order from the contractor addressed to the

City Recorder, to deliver to the Company from time to time, as certain warrants shall be accepted, the warrants to be drawn by the City on a fund, equal in value to materials furnished by said Company used in such work, does not contain words of transfer or purport to assign an interest in the amount due or to become due from said City to said contractor, and is not directed to the Auditor or custodian of the funds, and hence is not a complete equitable assignment of the contractor's claim."

The Court further says:

"But, waiving this point," (the point that the order does not contain words of transfer, et cetera, which I have just quoted) "and assuming that in this respect the order is sufficient to constitute an equitable assignment, the fatal objection remains that it did not vest in the Fuel Company a right to the warrants or authorize the City Engineer to deliver them without the order of approval of Dill. It is only upon the presentation of bills for lumber, approved by Dill, that the City Recorder is authorized, under this order, to deliver warrants to the Fuel Company. The contract was not complete. Something remained to be done in the future by Dill before the right of the Company to the warrant should become absolute."

While the first portion of the decision quoted strongly supports the complainant's position herein, the latter quotation shows that the case is distinguished from the case at bar upon the facts.

The question has been briefed at length upon the assumption that the alleged assignment involves

the doctrine of equitable assignment. After a careful examination of the cases and the law of this State as found in the State codes and decisions of [178] the State courts, I am of opinion that the question presented does not involve the doctrine of equitable assignment.

The doctrine of equitable assignment as applied to choses in action arose because of the common law rule that choses in action were not assignable, and, as in other instances, equity found a method to accomplish what could not be done at law. Story in his work on *Equity Jurisprudence*, 13th Edition, Vol. 2, page 347, says:

"It is a well-known rule of common law that no possibility, right, title or thing in action can be granted to third persons. For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would in effect be a transfer of a law suit to a mere stranger. Hence a debt or other chose in action could not be transferred by assignment except in case of the king. . . . At law, with the exception of negotiable instruments and some few other securities, this still continues to be the general rule unless the debtor assents to the transfer; but if he does assent, then the right of the assignment is complete at law, so that he may maintain a direct action against the debtor upon an implied promise to pay him the sum, which results from such assent."

And at page 366, in discussing trusts and equitable assignments, he states the following:

"Indeed, any order, writing or act which makes

an appropriation of a fund amounts to an equitable assignment of that fund. The reason is that the fund being matter not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity. . . . An assignment of a debt may be by parole as well as by deed." [179]

The authorities all emphasize the necessity of an appropriation of the fund, and without which there can be no equitable assignment. As stated by Mr. Justice Story: "Appropriation is all the nature of the case admits." And this is the foundation of the doctrine. Out of this grew the holding that a failure to surrender control was inconsistent with an appropriation, that any power of revocation or power to collect was fatal to the assignment. But in this State, "under the code there is no limitation upon the power to assign choses in action, and such an assignment carries the legal title."

Curtin vs. Kowalsky, 145 Cal. 434.

And this is true even if the assignment is for security only.

In the case of *Gilman vs. Curtis*, 66 Cal. 116, the Court says:

"Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be, and which were made by him, the legal title to the policy passed by the assignment to the defendant. The Court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive

from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of facts, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to plaintiff until the advances made by him are repaid."

There being no limitation upon the transfer of choses in action, the question as to whether or not an assignment took place is to be determined by the rules which govern the transfer and the passage of title to personal property. I find the following provisions in the Civil Code of this State, relating to this subject:

"Section 954: A thing in action arising out of the violation of the right of property or out of an obligation may be transferred by the owner."

"Section 1458: A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." [180]

"Section 1044: What may be transferred. Property of any kind may be transferred, except as otherwise provided by this article."

The only exception mentioned in the article is under Section 1045: "Possibility. A mere possibility not coupled with an interest cannot be transferred."

"Section 1052: When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute."

The transfer in question does not come within Section 1624, "What contracts must be written."

"Section 1039: Transfer what? Transfer is an

act of the parties or of the law by which the title to property is conveyed from one living person to another."

"Section 1083: What title passes. A transfer vests in the transferee all the actual title to the thing transferred which the transferee then has unless a different intention is expressed or is necessarily implied."

"Section 1084: Incidents. The transfer of a thing transfers also all its incidents, unless expressly excepted. But the transfer *for* an incident to a thing does not transfer the thing itself."

"Section 1140: Transfer of title under sale. The title to personal property sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

I find no similar provision relating to assignments, but the rule undoubtedly applies to assignments. The word "sale" is applied to a transfer of title to property reduced to possession and the word "assignment" to a transfer of title to property not [181] reduced to possession.

Cross vs. Sacramento Savings Bank, 66 Cal. 466.

I am of opinion that every requirement of the code relating to the transfer of personal property is present in the transaction under consideration. The demand was the property of the Company. The Company intended to transfer it as security to the Bank, the Bank paid a present consideration, and the Company received it, and there was a present intent to transfer all the interest of the Company in the re-

spective claims against the City intended to be assigned, to be held by the Bank as security, and therefore the legal title passed to the Bank. What steps the Bank intended to take to collect the money, or what the Company agreed to do to help the Bank collect the money, is immaterial. As the holder of the legal title, the Bank could compel the Company to endorse the warrants or it could proceed against the City direct by suit, if the treasurer refused to recognize its authority to collect the warrants.

In the case of *Scheerer vs. Edgar*, 76 Cal. 569, the Court say:

"In this case the course of the Auditor in making his warrant payable to Friedhofer was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the Board of Supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the Auditor was ended, and he certainly cannot be compelled to draw a second warrant, still less, to draw one in favor of a party who is not entitled to it under the order of the Board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so, but it did not give him the right to compel the Auditor to draw a warrant not authorized by law." [182]

Counsel for plaintiff states that this case is not in point, because this assignment was a legal assignment; that there was no question about the assignment; and further, that the statement of the Court

that Friedhofer could compel the endorsement, is *obiter dictum*. If I am correct in my conclusion that the facts constitute an assignment under the code, the assignment is a legal assignment. It is a transfer of the legal title to the Bank under the code, and the Bank stands in the same position as the judgment assignee in the Friedhofer case.

Considering the matter from the standpoint of an equitable assignment, I am also of opinion that the facts of the case constitute an equitable assignment within the rule of *Christmas vs. Russell*, above referred to. There was in fact a surrender of control, in that the Company was not in a position to collect the demand itself, it having parted with its right to receive the warrant, nor was it in a position to revoke the order upon the Auditor, the same having been given for a valuable consideration, nor to do anything by which it could control for its own use and benefit the claim due from the City. I believe that the control intended by the doctrine of equitable assignment is the retention by the assignor of some right over the fund which he is in position to enforce, either for his own benefit or for the benefit of another. I believe that a promise on the part of the company to endorse the warrant when the same should be ready, without any intention to reserve to itself the right to refuse to endorse the same—and the record does not show that the right to endorse this warrant was reserved by this Company for any purpose whatsoever—is not inconsistent with the existence of an equitable assignment. The thing assigned was not the warrant, but the demand or claim against

the City. The order on the Auditor is a sufficient appropriation. The words that the Bank is "authorized [183] and empowered to *draw* the warrants in favor of the Company" have a further significance than merely to receive the paper warrant, and in my opinion embraces the payment of the money to the Bank. The Bank could enforce its claim by suit against the City without endorsement of the warrant.

In the case of *McIntyre vs. Hauser*, 131 Cal. 11, the Court say:

"In order to constitute an equitable assignment of a debt, no express words to that effect are necessary, if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment would have been held to have taken place."

Counsel for complainant emphasizes the words of *Christmas vs. Russell*, that "the intent to transfer and its execution" are indispensable. Under the rule as laid down in *McIntyre vs. Hauser*, if the intent to transfer title existed, the passage of title takes place. And I have found that such intent existed in the case at bar. If there is any inconsistency between the rule of *McIntyre vs. Hauser* regarding equitable assignment and the rule as laid down in *Christmas vs. Russell* and the other cases referred to, the rule as announced by the Supreme Court of this state is the controlling law between these parties.

As a conclusion of law I find:

That the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910,

assigned by the Company to the Bank as security for the repayment of loans amounting to \$35,000 made by the Bank to the Company, and that said assignment and the right of the Bank to receive the moneys due upon said fourth progress payment are not affected by the notices to withhold made by complainant. [184]

Respectfully submitted,

ARMAND B. KREFT,

Special Referee and Examiner.

San Francisco, July 12, 1912.

The costs of this proceeding are the *reparation* and expenses of this report, shorthand and typewriting, amounting to \$35.

The referee has received no compensation for his services herein, and respectfully requests the Court to allow a reasonable fee therefor.

Filed Jul. 16, 1912. [185]

[Title of Court and Cause.]

**Exceptions of Paul I. Welles, Complainant, to Report
of Referee and Examiner.**

EXCEPTIONS of Paul I. Welles, Complainant, to the Report of Hon. Armand B. Kreft, Referee in Bankruptcy, as Special Referee and Examiner Herein, to Whom This Cause was Referred by Order of This Court Made and Entered on the Fifteenth Day of April, Nineteen Hundred Twelve, and Who Filed Said Report July Sixteenth, Nineteen Hundred Twelve.

The complainant excepts to said report:

FIRST EXCEPTION: For that said referee and examiner in said report, on page two thereof, has given the bankruptcy proceeding entitled "In the Matter of the Estate of Metropolis Construction Company, a Corporation, Bankrupt," the number 15,148, which is the number of this cause, whereas the said referee and examiner should have reported the number of said bankruptcy proceeding as number 6,827. [186]

SECOND EXCEPTION: For that said referee and examiner has in said report, on page fifteen thereof, stated as his conclusion that the Supreme Court of the State of California, in the case entitled "Newport Wharf & Lumber Company against Drew," 125 California Reports, 585, held, among other things, that "an assignment of a payment cannot be made before the payment is due," whereas the said referee and examiner should have concluded that the Court in said case against Drew held (not that an assignment could not be made at all, until the payment was due, but) that an assignment of a payment can not be made before the payment is **MATURED**, so as to take precedence over a notice to withhold.

THIRD EXCEPTION: For that said *fereree* and examiner in said report, on page sixteen thereof, finds that the contract with the city provides for the making of payments "in the manner provided by law" without mentioning, whereas said report should find, in that connection, that said *contrac* also provides that progress payments—like that involved in this action—"may at any time be withheld" upon certain stated conditions.

FOURTH EXOEPTION: For that said referee and examiner in said report, on page nineteen thereof, concludes that the fourth progress payment became due the Metropolis Construction Company, bankrupt, on the sixth day of December, 1910, when approved by the Board of Public Works and that said company had a vested right therein which was assignable and that if an assignment was in fact made to the bank, the bank is entitled to the moneys payable under the demand notwithstanding the notices to withhold made by Welles, whereas he should have concluded that in as much as the [187] demand for the fourth progressive payment, having been approved by the Board of Public Works December 5, 1910, and then "withheld" by that Board until after December 25, 1910, did not receive the approval of the Board of Supervisors until January 4, 1911, after Welles gave his notices to withhold (December 12 and 15, 1910), said fourth progressive payment was not **MATURED** until the said fourth day of January, 1911, nor at the time said notices to withhold were given by Welles, and that, consequently, the Metropolis Construction Company did not have any right to immediate payment thereof until January 4, 1911, nor at the time of said notices of Welles, and, hence, that the assignments or attempted assignments by said company on December 6th and 7th, 1910, to the Portuguese Bank were subject to the prior right. of Welles under said notices to withhold.

FIFTH EXCEPTION: For that said examiner and referee (on page twenty-six) in said report, con-

cludes that on December 6th and 7th, 1910, the Metropolis Construction Company, by borrowing money from the bank, intending to give it an assignment, but in fact given it a paper writing limiting its authority, to receiving a warrant, from the city auditor, not the fund holder, made out in the company's name, at some future undetermined date, operated to make the bank, on said 6th day of December, 1910, the equitable assignee of said fourth progressive payment; whereas he should have concluded that said state of facts did not operate to give the bank control over the said fourth progressive payment for the reason that said warrant or demand has not then (december 6, 1910) come into possession of the said Auditor, and did not come into his possession until January 6, 1911; and also for the reason that when the bank should [188] receive possession from the auditor (under the authority it had from the company) the City Treasurer (who was the fund holder) could not safely pay the same and would not be compelled to do so although forbidden by the company, because the warrant required the signature of the company in whose name it then existed, which could only be obtained by the bank through persuasion (consent) or force (a lawsuit), and, hence, that said bank did not acquire an equitable assignment as of said December 6, 1910, of said fourth progressive payment, nor as of any date prior to January 6, 1911, the date when the said demand came into actual possession of said city auditor.

SIXTH EXCEPTION: For that said referee and examiner in said report errs in concluding that

said company on December 6, 1910, transferred to the Portuguese-American bank, and said bank received, a legal title to the fourth progressive payment, and for that said conclusion is against law.

SEVENTH EXCEPTION: For that said examiner and referee in said report concludes that the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910, assigned by the Metropolis Construction Company to the Portuguese-American bank of San Francisco as security for the repayment of loans amounting to \$35,000, made by the bank to the company, and that said assignment and the right of the bank to receive the moneys due upon said fourth progressive payment are not affected by the notices to withhold made by complainant, whereas said referee and examiner should have concluded that said fourth progressive payment was not assigned by said company to said bank on December 6, 1910, or at all; also, [189]

EIGHTH EXCEPTION: For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that by the transactions of December 6, 1910, between the company and the bank and the paper received and accepted (and served upon the auditor) by the latter, the bank obtained, at most, merely a right to receive the warrant for said fourth progressive payment when it should come into the possession of the city auditor of San Francisco, which did not occur until January 6, 1911; also

NINTH EXCEPTION: For that said referee and examiner in his said report omitted to conclude,

where he should have concluded, that if any assignment exists in favor of said bank, arising from the facts found, it did not arise until January 6, 1911.

TENTH EXCEPTION: For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the notices to withhold made by complainant.

ELEVENTH EXCEPTION: For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy of said bankrupt, under the amendment of 1910, to the bankruptcy act, as "execution creditor."

TWELFTH EXCEPTION: For that said referee and examiner in said report did not conclude, whereas he should have concluded and found, that because no new testimony nor [190] evidence have been introduced on this hearing, his said report, filed July 16, 1912, being upon the facts as they stood of record on December 12, 1911, in this court and cause, between these parties, and because the facts as they thus stood of record on December 12, 1911, as appears by the report of this same referee and examiner then before the court (the transcript then on file being the identical transcript and evidence used on this hearing) are now, and were then, undisputed

facts and not findings upon any conflicting or contentious testimony, and because the court, on December 12, 1911, upon these admitted and established facts made its memorandum opinion and order directing a decree in favor of complainant (although it afterward made an interlocutory order whereby the bank should be given an opportunity to introduce further or new evidence if it desired, which it has not done); that such memorandum opinion and order of December is, under the unchanged state of the record, the law of the case in this court, and becomes conclusive, excepting only on review by an appellate court, and that complainant is, therefore, entitled to a decree as prayed. (*Lowe vs. California State Federation of Labor*, 189 Fed. Rep. 714, at page 715.—July 25, 1911, opinion by VAN FLEET, District Judge.)

THIRTEENTH EXCEPTION: For that said referee and examiner has in said report, on page twenty-one thereof, stated it as his opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the auditor, was intended; that it was not the intention of the company to reserve any right for its own use or benefit or at all, either to revoke the [191] order on the auditor or to collect the money; whereas he should have, in said report, stated and found that the evidence in this cause is insufficient to establish that an assignment of the demand was intended, but establishes that merely a right to receive the paper warrant from the auditor was intended; that it was the intention of the company,

also, to reserve to itself the right to endorse the warrant, and also to be present at the collection of, and itself to collect, the money on the warrant, for the fourth progressive payment, and that it did in fact reserve to itself such right; also, that it did as a matter of law retain the right to revoke the order on the auditor, and also, to collect the money.

FOURTEENTH EXCEPTION: For that said referee and examiner in said report, on page six thereof, finds that when Chris Emille turned over said order to the bank he understood that it was an assignment for the bank to draw the money from the treasury, that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein; whereas he should have found and stated in said report that the evidence was insufficient to show said alleged facts, or any of them, and, also, that said Chris Emille then intended that said order should be merely authority for the bank to receive the warrants made out in the name of the construction company from the auditor when he should have them, thus making it incumbent upon the bank to request the company's signature before it could demand the money from the city treasury.

WHEREFORE complainant prays that an order be made directing a decree in favor of complainant as prayed for in his complaint as amended. [192]

August 14, 1912.

C. A. S. FROST,
Solicitor for Complainant.

Receipt of a copy of within Exceptions this fourteenth day of August, 1912, is admitted.

JAS. B. FEEHAN,

CHARLES J. HEGGERTY,

Solicitors for Portuguese-American Bank of San Francisco, Defendant.

Filed Aug. 14, 1912. [193]

[Title of Court and Cause.]

Exceptions of John Daniel, Trustee of the Estate of Metropolis Construction Company, a Corporation, Bankrupt, Defendant, to Report of Special Referee and Examiner.

Now comes the defendant John Daniel, trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, and excepts to the findings of fact and conclusions of law filed herein by Hon. Armand B. Kreft, special referee and examiner herein, in the following particulars, to wit:

1. Said defendant adopts in this behalf and presents the exceptions filed herein by Paul I. Welles, complainant, to said report.

2. Said defendant excepts to the finding of fact by said special referee that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of \$38,000, to the Portuguese-American Bank, as security for the repayment of loans amounting [194] to

\$35,000, made by said bank to said company, because said finding is not warranted or sustained by the evidence.

3. Said defendant excepts to the conclusion of law of said special referee that said authorization to the Auditor of the City and County of San Francisco, as shown on pages 5 and 6 of said report, constitutes a legal or equitable assignment of said several fourth progressive payments or of the moneys represented thereby, because said conclusion is contrary to law.

4. That said special referee erred in his conclusion of law that said authorization was not affected by the notices to withhold given said Auditor by complainant herein, for the reason that said conclusion is contrary to law.

Respectfully submitted,
MORRISON, DUNNE & BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Solicitors for Defendant, John Daniel, Trustee.

Receipt of a copy of the within is hereby admitted this 16th day of August, 1912.

JAMES B. FEEHAN,
CHAS. J. HEGGERTY,
Attorneys for Complainant.

Filed Aug. 16, 1912. [195]

[Title of Court and Cause.]

**Order Submitting Exceptions to Report of Special
Referee and Examiner.**

The exceptions to the report of the special Referee and Examiner filed herein on July 16, 1912, this day came on for hearing, C. A. S. Frost, Esqr., appearing for and James B. Feehan, Esqr., and Chas. J. Heggerty, Esqr., appearing against said exceptions, and thereupon upon motion of said Attorneys by the Court ordered that said exceptions be, and they are hereby submitted to the Court for determination upon the briefs on file. [196]

**[Order Setting Aside Submission and Restoring
Case to Calendar.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 19th day of December, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

By the Court ordered that the submission in each of the following cases be, and the same is hereby, set aside, and said cases restored to the calendar, to wit:

* * * * *

#15148.

WELLES

vs.

DANIEL.

* * * * *

[197]

[Title of Court and Cause.]

Order Resubmitting Cause.

Counsel for the respective parties being present in open court and consenting thereto, by the Court ordered that this cause be, and the same is hereby, re-submitted to the Court for decision, upon the briefs on file therein. [198]

[Opinion.]

[Title of Court and Cause.]

DIETRICH, District Judge.

Upon consideration I have become satisfied that the conclusion reached by the referee or examiner is correct and that his report should be approved. The contention urged under the complainant's "point one" has caused me some hesitation, for I have no disposition to render a decision at variance with the previous rulings in the case, but upon reflection I am persuaded that it was the intention of Judge De Haven in reopening the case that it should be considered or reconsidered upon its merits; and such seems to have been the understanding of the referee.

As to the "second" and "third points," it is thought that the transaction between the officers and the Portuguese-American Bank and of the Metropolis Construction Company on December 5th, 1910, operated to assign the claim in question against the city, from the company to the bank, and that under the rule of *Newport Wharf and Lumber Co. vs. Drew*, 125 Cal. 585, the notice to withhold came too late to create a lien in favor [199] of the plaintiff.

My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want of vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice

until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally or specifically advised of the rights or interests of the plaintiff.

A decree will go against the plaintiff and in favor of the bank. [200]

As to the compensation of the referee or examiner, he presents a statement in which the time which he has given to the matter is estimated to be about ten days; he will therefore be allowed One Hundred (\$100.00) Dollars for his services.

Filed Jan. 18, 1913. [201]

[Order Entered January 18, 1913, Confirming Report of Referee and Directing Entry of Decree in Favor of Portuguese-American Bank of San Francisco, etc.]

[Title of Court and Cause.]

This cause having been heretofore submitted to the Court for decision, now after due consideration had, the Court files its written decision, and by the Court ordered that the report of the referee herein be, and the same is hereby confirmed, and that a decree be entered in favor of the Portuguese-American

Bank of San Francisco, in accordance with the directions contained in said decision. Further ordered that the referee be, and he is hereby, allowed the sum of \$100, for his services herein. [202]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN EQUITY—No. 15,148.

PAUL I. WELLES,

Complainant,

vs.

JOHN DANIEL, Trustee of the Estate of
METROPOLIS CONSTRUCTION COM-
PANY, a Corporation, Bankrupt; PORTU-
GUESE-AMERICAN BANK OF SAN
FRANCISCO, a Corporation, and THOMAS
F. BOYLE,

Defendants.

Decree.

This cause came on to be heard upon the report of A. B. Kreft, Esq., special referee and examiner, dated July 12, 1912, and filed herein July 16, 1912, and upon the exceptions taken to said report on the part of complainant Paul I. Welles, and also on the part of defendant John Daniel, trustee, and on the part of Pacific Coast Casualty Company and no other exceptions or objections to said report having been made or filed; and said cause having been argued by counsel, was on the 15th day of January, 1913, submitted to the Court for final judgment and decree, and after due deliberation had thereon the Court

finds, orders, adjudges and decrees as follows:

That the exceptions, and each of them, taken to the report of the special referee and examiner filed herein July 16, 1912, on the part of complainant, and on the part of defendant John Daniel, trustee, and also on part of the Pacific Coast [203] Casualty Company, be, and the same are hereby overruled, and that said report be, and the same is hereby in all respects confirmed.

That the compensation of said referee and examiner be, and the same is hereby fixed at the sum of \$100 and his expenses and disbursements at the sum of \$35; and that the same shall be paid out of said sum and taxed as costs against complainant and the said defendant John Daniel, as such trustee.

That complainant take nothing by his amended bill of complaint against defendant Portuguese-American Bank of San Francisco.

That said complainant take nothing by his amended bill of complaint against defendants John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

That defendant Portuguese-American Bank of San Francisco has a good and valid assignment of the fourth progress payment of \$6,830.85 referred to in said report, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder; that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are

not, affected by or subject to any notices to withhold made by complainant Paul I. Welles.

That defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by [204] him as such trustee to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

That the temporary injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

That said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

Dated January 30th, 1913.

FRANK S. DIETRICH,

Judge.

Filed Jan. 30, 1913. [205]

[Title of Court and Cause.]

**Petition for Appeal by John Daniel, Trustee of the
Estate of Metropolis Construction Company, a
Corporation, Bankrupt, Defendant.**

The above-named defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, feels himself aggrieved by the Decree made and entered on the 30th day of January, 1913, in the above-entitled case; and does hereby APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [206]

AND said defendant John Daniel, Trustee as aforesaid, says that the defendants Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, have refused to join in this appeal; and complainant, Paul I. Welles, also, has not joined herein; and the said John Daniel, Trustee as aforesaid, further prays that due notice may issue and be served upon said Portuguese-American Bank of San Francisco, a corporation, and upon said Thomas F. Boyle, defendants, and said Paul I. Welles, complainant above mentioned, requiring them to show cause why they should not join in this appeal, or

sever their interests from the interests of this appellant.

Dated February 3d, 1913.

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Solicitors for Defendant John Daniel.

Receipt of a copy of the within Petition for Appeal this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant. [207]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [208]

[Title of Court and Cause.]

**Notice of Petition by Trustee in Bankruptcy for
Severance on Appeal.**

The Portuguese-American Bank of San Francisco, a Corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, above named, ARE HEREBY NOTIFIED that at 10:00 o'clock A. M., at the courtroom of said court in the United States postoffice and courthouse in San Francisco, California, on the 8th day of February, 1913, the under-

signed, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant above named, will present to said Court his Petition for Appeal from the Decree rendered and entered January 30th, 1913, in the above-entitled court and cause, in which controversy Paul I. Welles is complainant and Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, and the undersigned Trustee, are defendants, or opposing parties; [209]

AND said Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, ARE HEREBY NOTIFIED that the undersigned, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, is about to take said appeal, and they are hereby notified to unite therein or failing this, they will be made appellees.

Dated February 3, 1913.

MORRISON, DUNNE & BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Attorneys for John Daniel, Trustee of the Estate of
Metropolis Construction Co., a Corporation,
Bankrupt, Defendant.

Receipt of a copy of the foregoing Notice this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

C. A. S. FROST,
Attorney for Paul I. Welles, Complainant. [210]

EDWARD F. MORAN,
Attorney for Thomas F. Boyle, Defendant.
Filed Feb. 4, 1913. [211]

[Title of Court and Cause.]

**Assignment of Errors, on Appeal of John Daniel,
Trustee of the Estate of Metropolis Construction
Company, a Corporation, Bankrupt, Defendant.**

NOW comes John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, Complainant, dated August 14th, 1912, to be not [212] well

taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately and specifically, as though the same were herein set forth in separate paragraphs. (Said Exceptions Nos. 2 to 13 were expressly adopted and presented by this defendant, John Daniel, Trustee, as and for his Exceptions also to the report of said Special Referee and Examiner, by the written Exceptions of said defendant Trustee, duly made and filed in said Court and Cause within the time allowed by law.)

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.

4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progress-

ive payment was not affected by the Notices to Withhold made by complainant. [213]

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings on December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, [214] bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), and including said fourth progressive payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00) made by said Bank to said Company.

13. In not holding that the evidence establishes that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.

14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that

said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment [215] or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are not, affected by or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and,

in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved. [216]

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, defendant John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, prays that the Order and

Decree of said District Court of the United States,
be corrected and reversed.

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Solicitors for Defendant John Daniel, Trustee.

[217]

Receipt of a copy of within assignment of errors
this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Cor-
poration, Defendant.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [218]

[Title of Court and Cause.]

Petition by Complainant for Appeal.

The above-named complainant, Paul I. Welles, conceiving himself aggrieved by the Order and Decree made and entered on the 30th day of January, 1913, in the above-entitled cause, DOES HEREBY APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of

Errors, which is filed herewith; and he prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said Order and Decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 8th, 1913.

PAUL I. WELLES,

Complainant.

C. A. S. FROST,

Attorney for Complainant. [219]

The foregoing Claim of Appeal is allowed.

Dated February, —, 1913.

Judge.

Receipt of a copy of the within petition by complainant for appeal, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 8, 1913. [220]

[Title of Court and Cause.]

**Assignment of Errors, on Appeal of Paul I. Welles,
Complainant.**

NOW comes Paul I. Welles, complainant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913; respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, complainant, dated August 14th, 1912, to be not well taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately [221] and specifically, as though the same were herein set forth in separate paragraphs.

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.

4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progressive payment, was not affected by the Notices to Withhold made by complainant.

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the [222] warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings of December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank

may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), and including said fourth progressive [223] payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00), made by said Bank to said Company.

13. In not holding that the evidence established that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.

14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand [224] Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the same demand and the said money and the proceeds thereof were not, and are not, affected by

or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its [225] costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that

complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, complainant, Paul I. Welles, prays that the Order and Decree of said District Court of the United States be corrected and reversed.

C. A. S. FROST,

Attorney for Complainant, Paul I. Welles.

Receipt of a copy of the within Assignment of Errors, on Appeal of Paul I. Welles, complainant, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN, [226]

Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 8, 1913. [227]

[Title of Court and Cause.]

**Consent of Paul I. Welles, Complainant, to Unite
With John Daniel, Trustee of the Metropolis
Construction Company, a Corporation, Bank-
rupt, Defendant, in Appeal.**

COMES NOW Paul I. Welles, complainant in the above-entitled action, and, for answer to the Notice of John Daniel, Trustee, defendant, requiring him to show cause why he should not join in the appeal of said John Daniel, Trustee, defendant, states to the Court that he desires to unite in said appeal and does hereby unite therein with said John Daniel, Trustee as aforesaid; that he has filed herein his Assignment of Errors and Petition for Allowance of Appeal and respectfully prays that the same be now allowed.

Dated, February 8th, 1913.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant. [228]

Receipt of a copy of within Consent to Unite in Appeal this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and Appellant.

Filed Feb. 8, 1913. [229]

[Title of Court and Cause.]

**Order Granting Appeal, Severing Codefendants and
Allowing Supersedeas.**

The defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy arising out of a bankruptcy proceeding now pending in our said court, having heretofore filed herein his Petition for Appeal and his Assignment of Errors, and having given notice to the Portuguese-American Bank of San Francisco, a corporation, defendant, and to Thomas F. Boyle, defendant, and to Paul I. Welles, complainant; and the said Portuguese-American Bank and the said Thomas F. Boyle, defendants, appearing, and said complainant, Paul I. Welles, having appeared and filed herein his Assignment of Errors and Petition and having united with said Trustee in said Appeal, said Appeal is **ALLOWED**; and [230] said Portuguese-American Bank, a corporation, defendant, and said Thomas F. Boyle, defendant, may be made appellees. Said Appeal is to operate as a supersedeas of the Decree appealed from upon complainant giving a bond in the sum of \$1,000.

Dated, February 10th, 1913.

WM. C. VAN FLEET,
Judge.

Filed Feb. 10, 1913. [231]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Paul I. Welles, as principal, and United States Fidelity and Guaranty Company, a corporation, of Maryland, as surety, are held and firmly bound unto Portuguese-American Bank of San Francisco, a corporation, and unto Thomas F. Boyle, in the full and just sum of One Thousand Dollars (\$1,000), to be paid to the said Portuguese-American Bank of San Francisco and to said Thomas F. Boyle, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 13th day of February, in the year of Our Lord One Thousand Nine Hundred and Thirteen.

WHEREAS, lately, at the District Court of the United States for the Northern District of California, in a suit [232] depending in said court, between Paul I. Welles, complainant, and John Daniel, Trustee of the Metropolis Construction Co., a corporation, Bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, a decree was rendered against the said Paul I. Welles and also against said John Daniel, as Trustee of said Metropolis Construction Co., a corporation, bankrupt, and the said Paul I. Welles having obtained an Appeal and filed a copy thereof in the Clerk's office of the said Court, to reverse the

decree in the aforesaid suit, and a Citation directed to the said Portuguese-American Bank of San Francisco, a corporation, and the said Thomas F. Boyle, defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in said Circuit on the 10th day of March next.

NOW, the condition of the above obligation is such that if the said Paul I. Welles shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Paul I. Welles, as principal, has hereunto subscribed his name and affixed his seal, and the said United States Fidelity and Guaranty Company, a corporation, of Maryland, has caused its name to be hereunto subscribed and its seal hereunto affixed by its attorney in fact thereunto duly authorized the day and year first above written.

PAUL I. WELLES. [Seal]
Principal.

Witness:

C. A. S. FROST,

To Signature of Paul I. Welles. [233]

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

B. P. OAKFORD,

Its Attorney in Fact.

W. L. ALEXANDER,

Attorney in Fact.

Approved, February 13th, 1913.

[Seal]

WM. C. VAN FLEET,

Judge.

Filed Feby. 13, 1913. [234]

[Title of Court and Cause.]

Citation [on Appeal—Copy].

To Portuguese-American Bank of San Francisco, a Corporation, Defendant; to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be [235] holden at the City of San Francisco, in the said District, on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord Nineteen Hundred and Thirteen and of the Independence of the United

States of America the One Hundred and Thirty-seventh.

WM. C. VAN FLEET,
Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a Certified copy thereof with V. L. Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San Francisco, in said District on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,
U. S Marshal.

By Elmo Warner,
Office Deputy. [236]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San

Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,
U. S Marshal.

By _____,
Deputy.

Filed Feb. 10, 1913. [237]

[Title of Court and Cause.]

Statement of Proceedings and Testimony.

BE IT REMEMBERED that all of the testimony concerning the [238] alleged assignment of the fourth progress payment on the Fourth and Kentucky Streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the Referee, is as follows, to wit: [239]

[Testimony of Thomas F. Boyle, for Complainant.]

THOMAS F. BOYLE, being duly sworn as a witness on behalf of complainant, testified as follows:

Direct Examination.

My name is Thomas F. Boyle. I believe I am one of the defendants in this cause, and at present I am the Auditor for the City and County of San Francisco, State of California. I have occupied that office for more than a year last past. [240]

(Original demand for the fourth progress payment on the Fourth and Kentucky Streets job is read in evidence by counsel for complainant as follows:)

(Testimony of Thomas F. Boyle.)

(Written) "KENTUCKY STREET SEWER 1904."

(In red ink.)

(Printed)

PUBLIC BUILDING FUND SERIES 1904.

SEWER CONSTRUCTION ACCOUNT.

DEPARTMENT OF PUBLIC WORKS.

Auditor's No.

10922

\$6830.85

MATERIAL—LABOR.

Treasurer's No.

San Francisco Dec 5, 1910.

"Metropolis Construction Co. Presents this demand on the Treasury of the City and County of San Francisco, for the sum of Six Thousand eight hundred & Thirty 85/100 Dollars, Being for work done; material delivered as per bill attached."

(Attached to the demand, in the form of a bill, is the following:)

"San Francisco, Cal., Dec. 5, 1910.

City and County of S. F.

To Metropolis Construction Co., Inc., Dr.

ENGINEERS AND GENERAL CONTRACTORS.

Telephone Kearny 762

24 California St.

To fourth progressive payment Fourth and Kentucky 6830.85.

Prices and additions correct.

L. L. LEAVY.

Correct—L. E. HAUCK."

(Testimony of Thomas F. Boyle.)

(On the main body of the demand:)

“State of California,
City and County of San Francisco,—ss.

L. F. Strong being first duly sworn, deposes and says: That he is a duly authorized agent of the party requested to perform the work mentioned in the foregoing demand; that the [241] work therein specified has been actually performed, and the material mentioned has been actually delivered, and the charges made are the proper and true values for the same.

Subscribed and sworn to before me this 5 day of Dec., A. D. 1910.

(Signed) L. F. STRONG.

(Signed) GEO. A. BERGER,
Asst. Clerk Board of Supervisors.

“The above demand is authorized by Chapters II, III and IV of the Charter of the City and County of San Francisco, approved by the Legislature, January 19, 1899, and by Ordinance No. 477, approved January 20, 1908, providing for the issuance, sale and redemption of bonds of the City and County of San Francisco, in accordance with the result of a Special Election held in the City and County, May 11, 1908, and by Resolution or Ordinance No. 1197 of the Board of Supervisors.

Allowed Jan. 5, 1911.

City and County Auditor.

By _____,
Deputy.

(Testimony of Thomas F. Boyle.)

**"PUBLIC BUILDING FUND SERIES 1904.
SEWER CONSTRUCTION ACCOUNT."**

(Endorsed:)

"Auditor's Receipt No 49123.

"I hereby certify that the labor mentioned in the within account has been actually performed; that the material has been actually received solely for the use of the City and County of San Francisco.

(Signed) **MARSDON MANSON. [242]**

By **HARRIS D. CONNICK."**

"Approved by Board of Public Works in open session.

JOSEPH L. McCORMICK,
Secretary."

"Resolution No. 8122."

(Signed:) **"M. CASEY,
W. A. NEWSOM,
Commissioners."**

"Bookkeeper's No. 7981.

"Entered. (Signed:) **L. L. LEAVY.**

"Approved: (In red ink:) to print Dec. 5, 1910."

(Signed) **"ROBERT J. LOUGHREY.**

_____,
Committee Board of Supervisors.

"Received payment _____."

(Also endorsed:)

(Testimony of Thomas F. Boyle.)

SEWER CONSTRUCTION ACCOUNT.

PUBLIC BUILDING FUND 1904.

Treasurer's No.

Auditor's No. _____

10922.

KENTUCKY ST. SEWER.

**DEPARTMENT OF PUBLIC WORKS CON-
TRACT.**

DEMAND ON THE TREASURY.

By Metropolis Const. Co. Dec. 5, 1910, for \$6830.85.

"In Board of Supervisors" (Rubber stamp erased with pen: "Dec. 12, 1910.") (Rubber stamp not erased:) "Jan. 3, 1911."

Referred to Finance Committee.

Approved (Signed:) J. L. Herget, J. McLaughlin.

Approved by Board of Supervisors in open session (Rubber stamp, erased with pen: "Dec. 12, 1910." Rubber stamp not erased:) Jan. 3, 1911." "For (in red ink:) \$6830.85." [243]

(Signed): "John H. Ryan, Asst. Clerk." (Initials in red ink:) "C. W."

(Signed:) "W. R. Hagerty Clerk."

"Approved": (Rubber stamp scratched out with pencil: "Dec. 13 1910.") (Rubber stamp not scratched out:) "Jan. 4, 1911."

(Signed): "P. H. McCarthy, Mayor,"

"Clerk's No. 20840."

Mr. FROST.—Accompanying this is an estimate dated December 3, 1910, by the city engineer, being the fourth progressive estimate on the Fourth and Kentucky street contract, amounting to \$9,107.80, of

(Testimony of Thomas F. Boyle.)

which the demand in question is 75 per cent. There is a letter attached to it, but I do not offer the letter.

(Witness continuing:) I regard the letter as part of the demand.

Letter referred to read in evidence by counsel for defendant Portuguese-American Bank as follows:

"Fourth & Kentucky Street Sewer, Fourth Payment."

"December 3d, 1910.

"To the Honorable Board of Public Works of the City and County of San Francisco:

"Gentlemen:

"The following estimate of the value of the labor done and materials incorporated into the work since the last preceding estimate was made for the construction of sewers and appurtenances in Kentucky street and Fourth street has been made to the 1st day of December, 1910.

"This estimate is based upon the amount of work which has been completed in accordance with the plans and specifications and upon the whole amount of money that will become due according [244] to the terms of the contract when the whole of the proposed work shall have been completed.

"This contract was awarded on July 8th, 1910, to the Metropolis Construction Co. for the sum of \$33,182. The estimated value of the labor done and materials incorporated in the work since the last preceding estimate was made is \$9,107.80. Under the terms of contract, the contractor, the Metropolis Construction Co. is entitled to the payment of an amount

(Testimony of Thomas F. Boyle.)

equal to 75 per cent of the above estimate, or to \$6830.85.

"A summary of the value of the labor done and materials incorporated into the work since the contractor began the performance of his contract and the progress payments previously recommended follows:—

Total estimated value of work completed

December 1, 1910.....\$28,609.05

75 per cent of total estimated value..... 21,456.79

Total progress payments previously re-

commended..... 14,625.94

Balance due contractor..... 6,830.85

Respectfully submitted,

MARSDON MANSON,

City Engineer."

(Initialed) L. E. H/J." [245]

I have with me the original demand for the fourth progress payment on the Fourth and Kentucky Streets job. (Producing.) That is the paper that I have in my hand now. That is a demand for the fourth progress payment on the Fourth and Kentucky Street contract between the Metropolis Construction Company and the City and County of San Francisco.

I am familiar with the signatures that appear upon that demand and on the letter that has just been read. As Auditor of the City and County of San Francisco, I have seen the signatures of those persons many times. They are the signatures of the persons whose names are signed to the document, the

(Testimony of Thomas F. Boyle.)

Mayor and members of the Board of Supervisors and others. I received that document on January 5, 1911. It came to us from the Board of Supervisors and has been in my possession ever since, that is, I have had that paper ever since—I have had this demand ever since that day. Since that day there has been one other demand passed through my office as Auditor on this Fourth and Kentucky Streets contract. That was the fifth and final payment; I did not make a record of the amount. I could not say whether or not it was \$11,049.64; I have not got a memorandum of it; anyway, it was the fifth and final payment on this contract. That was after the contract was accepted. It came through the usual [246] way. It was passed by all these different members of the committees in the usual way, from the Board of Supervisors. That was after the contract was accepted in the usual course of business. John Daniel, as receiver and trustee of the Metropolis Construction Co. got the demand. At the time I gave that demand to Mr. Daniel, there were no claims against it—there were some but those who held them consented to release the demand and to turn the demand over to Mr. Daniel, the trustee. So far as the City is concerned, there are not any claims now against this demand—against the fourth progress payment. As far as the City is concerned, that is, the Board of Supervisors, the Board of Public Works and the Mayor, they are through with it. They have no further interest in the Fourth and Kentucky Streets contract that I know of, other than

(Testimony of Thomas F. Boyle.)

—that the Board of Supervisors usually, where there are protests against payments, they also notify the Auditor of those protests. Those come in the usual course of business. But there has been nothing of that kind on behalf of the City itself or any officer of the City; and I personally don't claim any interest in the demand, that is, this particular fourth progress payment now. I said that we made the fifth payment to John Daniel, Trustee. I am familiar with these bankruptcy proceedings, that is, I have been advised that Mr. Daniel is the trustee of the estate of the Metropolis Construction Co. I have paid money over to him in due progress of business. As a matter of fact, I have been directed by the City to pay the money over to whomever is entitled to it, and on its face that is the Metropolis Construction Co. I have acted merely in the position of stakeholder. If it had not been for the fact that I feared [247] that I might incur some responsibility myself if I paid this money over to John Daniel, Trustee, I would do so. That is the only reason why I don't do it. The Portuguese-American Bank has made claim upon me and I feel that if I turn that warrant over in accordance with the demand of the trustee of the estate of the bankrupt, I might possibly incur some personal liability to the Portuguese-American Bank—there are some claims against this demand and until it is all straightened out, I am going to hold it to protect myself.

[Testimony of Chris Emille, for Defendant Portuguese-American Bank.]

CHRIS EMILLE, being duly sworn, as a witness on behalf of defendant Portuguese-American Bank, testified as follows:

Direct Testimony.

On December 6, 1910, and for the year prior thereto, I was president and general manager of the Metropolis Construction Company. On December 5, 1910, I went to the Portuguese-American Bank of San Francisco to make a loan of \$30,000, and while there made the loan. On December 5, 1910, I brought the letter you (Counsel for Defendant Portuguese-American Bank) now hand me, addressed to Thomas F. Boyle, to the Portuguese-American Bank. When I got there, I think I first saw Mr. De Figueiredo. Then I tried to get \$30,000 on an assignment for money that we had due us from the City of \$30,000. I asked Mr. De Figueiredo to adopt the assignment of money of the Metropolis Construction Co. due with the City for work performed by the Metropolis Construction Company. We had this money coming to us from the City and we wanted to get that assignment to the Portuguese-American Bank so that we could use that money. I told Mr. De Figueiredo that we had so and so much money coming to us [248] from the City—\$38,000 either more or less—coming to the Metropolis Construction Co. for work performed for the City. At that time our Company was doing three jobs for the City—the Sunset, the Seventh Street, and the Fourth and

(Testimony of Chris Emille.)

Kentucky. We were putting in sewers. There was money due us on these particular jobs—around \$38,000. I know that on December 5, 1910, money was due the Metropolis Construction Company.

Counsel for defendant Portuguese-American Bank offered and read in evidence the letter or order addressed to Thomas F. Boyle that witness testified he brought to the Bank on December 5th, 1910. It is as follows:

“San Francisco, December 5, 1910.

“Thomas F. Boyle, Auditor of the City and County of San Francisco.

“Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

“First: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth street sewers; the contract being between the undersigned and said City and County, new bond issue of 1903.

“Second: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated March 25, 1910, for lower Sunset District Sewer and being contract No. 36. [249]

(Testimony of Chris Emille.)

"Third: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated June 22, 1910, and being for the construction of sewer in Seventh street, Howard and Hubbell street under contract No. 31.

METROPOLIS CONSTRUCTION CO., INC.

By **CHRIS EMILLE,**
President.

By **L. F. STRONG,**
Asst. Secretary."

(Seal of the Metropolis Construction Co. attached.)

(Marked:) "Received Auditor's Office December 6, 1910. H. J. and L. F. Strong."

I signed that paper. I know that signature; it is Mr. Strong's. He is Assistant Secretary. The seal on it is the seal of the Metropolis Construction Co. I asked Mr. De Figueiredo to accept that assignment and let us have the money. I asked to borrow money from the Bank—\$30,000. Mr. De Figueiredo would not accept this except the Auditor accepted it, received it, you know, and that—I offered an assignment of that money that was coming to the Metropolis Construction Co. from the City according to these three resolutions. That paper I offered to turn over as security—that paper that I have just read to the court a few moments ago. At the time I offered that assignment as security, Mr. De Figueiredo told me to get that paper received by the Auditor; to go to the Auditor to get it stamped. Then I went to the Auditor's office and

(Testimony of Chris Emille.)

got this. He put this seal on it; he put this rubber stamp on it. I brought that paper back to the Bank—the same paper that the Auditor stamped—and turned it over to Mr. De Figueiredo and got that loan of \$30,000 on this assignment. Mr. [250] De Figueiredo is present here; there is the gentleman right there (indicating). I know that he has official connection with the Portuguese-American Bank of San Francisco. When I brought this assignment and gave it to Mr. De Figueiredo we got that amount of money, \$30,000.

(Counsel for defendant Portuguese-American Bank shows witness a paper—Note of the Metropolis Construction Co. to Portuguese-American Bank—purporting to be signed by J. A. Baptista, Secretary, and Chris Emille, President, and having the seal of the Metropolis Construction Co. attached.)

That is my signature. The other signature is Mr. Baptista's. The seal is the seal of the Metropolis Construction Co. On December 6, 1910, when I turned over that order of the Auditor that was just read in evidence, I gave Mr. De Figueiredo as further security, this note. Mr. Baptista was Acting Vice-President of our Company. I think he should put "Vice-President." He was not the Secretary of the Metropolis Construction Company; but he had the right to sign all checks and so forth.

Counsel for defendant Portuguese-American Bank offered and read in evidence the note identified by witness, of which the following is a copy:

(Testimony of Chris Emille.)

"San Francisco, Cal., December 6, 1910.

"No. S-122.

"\$30,000.

"On demand, at three o'clock p. m. of that day, no grace, for value received, in gold coin of the government of the United States, the Metropolis Construction Company, a corporation, promises to pay to the order of Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, thirty thousand dollars, with interest from date at the rate of seven per cent per [251] annum until paid, payable *montly*. Both principal and interest payable in like gold coin.

"In testimony whereof the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by a resolution of the Board of Directors of said corporation, duly adopted by a majority of said board at a meeting of the said board duly called and held.

"METROPOLIS CONSTRUCTION CO., INC.

"By J. A. BAPTISTA,

"Secretary.

"By CHRIS EMILLE,

"President."

(Seal of the Metropolis Construction Co. attached.)

At the time I delivered the assignment that was read in evidence, I delivered to Mr. De Figueiredo those resolutions that are hereto attached and the note that was just read in evidence—the note for

(Testimony of Chris Emille.)

\$30,000. I gave these very papers to Mr. De Figueiredo at that time.

Counsel for defendant Portuguese-American Bank offered in evidence the resolutions referred to, which were received without objection and marked respectively as follows:

Defendant Portuguese-American Bank's Exhibit No. 1. Resolution adopted by the Board of Public Works, showing the allowance of \$6,830.85 as the fourth progress payment on the contract for the construction of sewers in Kentucky and Fourth streets in favor of the Metropolis Construction Co. [252]

Defendant Portuguese-American Bank's Exhibit No. 2. Resolution adopted by the Board of Public Works, showing the allowance of \$19,167.20 to the Metropolis Construction Co. for sewers in Seventh Street.

Defendant Portuguese-American Bank's Exhibit No. 3. Resolution adopted by the Board of Public Works, showing the allowance of \$12,173.17 to the Metropolis Construction Co. for sewers in Lower Sunset District.

CHRIS EMILLE, recalled as witness for defendant Portuguese-American Bank, being duly sworn, testified as follows:

On or about December 7th—that is the day after I testified I was at the Portuguese-American Bank and turned over the assignment to the Bank as security for a loan of \$30,000. I called at the Bank again. On that day I borrowed \$5,000 more on the same assignment. I saw Mr. De Figueiredo and asked

(Testimony of Chris Emille.)

him to have the Bank give me \$5,000 more on the same assignment. He told me to go and see the president of the bank. Then I went in there to see the president of the Bank, and asked him the same question—to have the bank give me \$5,000 more on the same assignment. He first found a little objection to it, and afterward I got it. He allowed me \$5,000 more on the same assignment. Then a note was presented for me to sign.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note that was presented to me to sign. I signed that note. This is my signature. The seal is the seal of the Metropolis Construction Co.

Note identified by witness read in evidence by counsel for [253] defendant bank, as follows:

"\$5,000. San Francisco, Cal., December 7, 1910.

"On demand, at 3 o'clock P. M. of that day, no grace, for value received, in gold coin of the government of the United States, Metropolis Construction Company, a corporation, promises to pay to the order of the Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, Five Thousand and 00/100 Dollars, with interest from date at the rate of seven per cent per annum until paid, payable monthly. Both principal and interest payable in like gold coin.

"In testimony whereof, the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto

(Testimony of Chris Emille.)

affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by resolution of the Board of Directors of the said corporation, duly adopted by a majority of the said Board, at a meeting of the said Board duly called and held.

(Signed) "METROPOLIS CONSTRUCTION
CO.

"By J. A. BAPTISTA,

"Asst. Treas.

"By CHRIS EMILLE,

"President."

(Seal of the Metropolis Construction Co. attached.)

The Metropolis Construction Co. gave as security for this note or with this note the same assignment as the \$38,000 held by the City Treasurer. That is the same \$38,000 held by the City Treasurer, the Auditor. That was the \$38,000 that had been assigned to the Bank before. I've been told that none of those loans has been repaid by the Metropolis Construction Co. I believe they have not been paid—I know they have not been paid. The Metropolis Construction Co. had one contract with the City and County of San Francisco for the construction of sewers on [254] Kentucky and Fourth Streets. This is the assignment (indicating) that was read in evidence. The contract that is mentioned in this is the only contract that we had with the City for the construction of sewers on Fourth and Kentucky Streets. This is referring to a paper I call an assignment which was read in evidence. At the time I

(Testimony of Chris Emille.)

turned it over to the Bank my understanding as to its nature was that it was an assignment for them to draw the money from the City Treasury.

[Testimony of L. F. Strong, for Defendant.]

L. F. STRONG, recalled as a witness on behalf of defendant Portuguese-American Bank of San Francisco, a corporation, being duly sworn, testified as follows:

Direct Examination.

I called at the Portuguese-American Bank of San Francisco on December 6, 1910—I believe that was the date. I went in with Mr. Emille and I saw Mr. De Figueiredo, and I stayed outside of the counter. Mr. De Figueiredo was inside the enclosure there. I believe at the receiving window. Mr. Emille was carrying on a conversation with him; then Mr. Emille went inside with Mr. Freitas. Mr. Emille was carrying on the conversation with Mr. De Figueiredo in my presence. I forget the exact words of the conversation but Mr. Emille was asking for an additional loan of \$5,000 on that assignment—the assignments of the City vouchers, amounting to \$38,000. I believe I was at the Bank once before this when they were arranging the details of making the assignments to the bank. I don't recollect exactly what was said on that day because I don't believe I heard the conversation. It was just merely arranging for the details of having those assignments made—the same assignments that they had before. I [255] didn't hear the conversation.

(Counsel for defendant Portuguese-American

(Testimony of L. F. Strong.)

Bank shows witness the letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese-American Bank, already read in evidence.)

The signature now shown me is my signature. I saw that on the date it bears, December 6th, 1910. I took it to the Auditor's office on December 6th. The seal shown me is the seal of the Metropolis Construction Co. The signature now shown me is the signature of Chris Emille, President of the Metropolis Construction Co. I believe Mr. Baptista came and took the paper to the Portuguese-American Bank. When we were at the Auditor's office, we filed one of these assignments, and had the Auditor stamp the other one as received. I was present with Mr. Emille when a loan of \$30,000 was asked of the Portuguese-American Bank by the Metropolis Construction Co.—at one of the times when he was arranging to make these assignments. I believe I was present both times when loans were requested. I don't believe the sum was \$30,000. I was with the Portuguese-American Bank in relation to the assignment of the particular warrants mentioned in that assignment. At that particular time, \$30,000 was requested. Mr. Emille asked the officials of the Portuguese-American Bank for this loan. It was asked at the time I was there. I don't believe that I heard the conversation, but I knew that that was what he was applying for at that time. I knew he was applying for it at that time because I had arranged the

(Testimony of L. F. Strong.)

details before that, as to the amount we were going to borrow. I heard conversations between Mr. De Figueiredo and Mr. Emille. Mr. Emille asked Mr. De Figueiredo for a further loan of \$5,000 on the assignments that he had already borrowed \$30,000 on. I [256] know that the loan of \$5,000 was made on the occasion that I have just mentioned. I know that the Metropolis Construction Co. gave a note to the Portuguese-American Bank for the sum of \$5,000 on that occasion. I saw Mr. Emille sign the note that was given.

(Counsel for defendant Portuguese-American Bank shows witness a note.)

I believe the note shown me is the note to which I refer. That signature shown me is Mr. Baptista's. I believe he is the Assistant Treasurer and Vice-President of the Metropolis Construction Co. The signature now shown me is Chris Emille's. The signature now shown me is the signature of the Metropolis Construction Co. The loan was made at the time that note was dated. I know that a resolution was passed by the Metropolis Construction Co. about January of 1910, empowering Mr. Emille to take full and exclusive charge and management of the affairs of the Metropolis Construction Co., and also giving him power to borrow money, and appointing him general manager. I was present at the meeting at which that resolution was passed. At that meeting, I was acting in the capacity of assistant secretary. At that time and subsequently during the year 1910 I was doing the duties of secretary of the Me-

(Testimony of L. F. Strong.)

Metropolis Construction Co. Mrs. Emille, the regular secretary, was not active during the year 1910 as secretary of the Company. I performed the actual duties of secretary of the Metropolis Construction Co. subsequent to January 1, 1910, and during the year 1910. I know that about the time of that meeting, a resolution prepared by Mr. Cochran, the attorney for the Company, was read or was introduced at the meeting that [257] I have just testified to. I do not know where that resolution is now. I do not know where the minute-book of the Metropolis Construction Co. is. I read the original resolution.

Cross-examination.

I acted as secretary of the Company. Mrs. Emille did not do the active duties of secretary. I don't believe I ever saw an actual minute-book of the corporation. I don't recollect of ever having seen the minute-book of that corporation. I saw the resolution I mentioned at the meeting. I believe I had it and Mr. Emille had it. It was typewritten on white paper. I believe it was filed away. Those different resolutions were kept at different places at different times. I don't know the exact location where this was filed. It was filed with the rest of the papers in Mr. Emille's desk, I think. I read it over myself. I have seen it since—the original resolution. I had several copies drawn at different times for different people's information. I did not make them myself—I ordered them made. I saw the original and read it over.

(Testimony of L. F. Strong.)

Redirect Examination.

The substance of the resolution was that Mr. Emille was appointed general manager of the Metropolis Construction Co., to bind it in any form that he might see fit; to borrow money, to make contracts; he was in the sole charge of all employees. That was according to that resolution under the action of the general manager; he was to have full power in regard to employees. My recollection is pretty good [258] about that. I had it come up several times, and I don't need to have it refreshed in any way. I could not say that all the wording is exactly the same, but the paper now shown me is a similar copy to the copy of the resolution that was adopted at the meeting I just referred to. It is substantially what was in that resolution. The resolution that I adopted was the same resolution that was received from Mr. Cochran about that time. I should judge it would be the secretary's duties to keep the minutes of the corporation. I do not know of the secretary, Mrs. Emmille, ever keeping any minutes of the corporation. I don't know of her ever taking any active interest in the duties of her office as secretary; as director, yes. Mr. Emille handled the resolutions that were adopted at the meetings. Resolutions were generally drawn up by Mr. Cochran, our attorney. I never saw Mr. Cochran write up any of the resolutions in any book kept by the corporation for the purpose of entering any minutes of the Board of Directors. At the time the meeting would be held, there would be

(Testimony of L. F. Strong.)

some notations or papers drawn up and filed away. I believe they were filed in a folder. Mr. Emille kept them. As far as I know, that is what the minutes consisted of, the folder. I did not attend all the meetings. At the meetings I attended, I made some notes. I gave them to Mr. Emille. He kept those together in his own desk. The directors at the time of this meeting were Mr. Chris. Emille, Mr. Alfred Reinicke and Mrs Chris Emille. Mr. Emille and Mr. Reinicke and I were present at this meeting when this resolution was adopted. [259]

Recross-examination.

Mr. Baptista's office was Vice-President and Assistant Treasurer. He had no other office to my knowledge. I held the office of Assistant Secretary all the time from about January, 1910, to about January, 1911, and exercised the duties of it all that time. Mr. Baptista was drawing checks and checking the accounts—all payable accounts of the Metropolis Construction Co. as to whether they were correct or not. He was there to take charge of the bookkeeping and for making the pay-rolls, and to see that the business went along in correct form; as a matter of fact, to see whether it was correctly done. I don't know what became of the folder in which these papers or notations of the minutes were kept. Some of the notations were typewriting and some of them were pencil, I suppose, or ink; various. As a matter of fact, the minutes of the meetings or of any one meeting might consist of several different papers. We drew up at several of the meetings

(Testimony of L. F. Strong.)

several resolutions tending along the lines of buying materials that were important.

Redirect Examination.

The duties of the different officers were not very clearly defined in that corporation. The resolution that I say was adopted was never revoked or cancelled. I believe there were by-laws before my time; I don't believe I ever read them; I think I did see them once.

Counsel for defendant Bank offered and there was admitted in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 4," a copy of a resolution passed by the directors of the Metropolis Construction Company in January, 1910, conferring [260] upon Chris Emille, the president of the company, the powers of General Manager of the Company with full and exclusive charge of the management and conduct of the affairs of the Company with full power to borrow money and to do and perform such things as may be necessary from time to time to carry on and conduct the affairs of the Company.

[Testimony of M. T. Freitas, for Defendant.]

M. T. FREITAS, recalled as a witness on behalf of Portuguese-American Bank of San Francisco, corporation, defendant, being duly sworn, testified as follows:

Direct Examination.

My name is M. T. Freitas. I live at San Rafael. My nationality is Portuguese. I was born in St. George Island, one of the Azores Islands. I was

(Testimony of M. T. Freitas.)

President of the Portuguese-American Bank of San Francisco during the year 1910. I was President of the Bank on December 5th and 6th when Mr. Emille came down there to see me about that time. I saw Mr. Emille on December 5th, 1910, at the office of the Bank in this City and County. Mr. Emille came in to see Mr. De Figueiredo, our cashier, to negotiate a loan. He wanted to negotiate a loan of \$30,000, and I asked him what collateral he had to put up for that loan. He then showed me an order on the Auditor for \$38,000 and the notice only being written out, and I told him I didn't think it was in proper condition to go through; that he ought to take it before the Auditor and have him acknowledge receipt before he could make the assignment. Then he said that he would go up and have it properly attended to.

(Counsel for defendant Portuguese-American Bank shows witness paper already introduced in evidence, being letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese- [261] American Bank.)

That is the paper that Mr. Emille brought to me on that occasion in order to assign his collateral. This stamp or this receiving part of it was not on at the time—this Auditor's receipt; that stamp. I wanted him to get a proper notice given to the Auditor before I took the assignment and loaned the \$30,000—let the \$30,000 go. He called on me later, but I don't recollect whether exactly the same

(Testimony of M. T. Freitas.)

day or the next day. I would not say positively; but when he saw me the next time he presented the document as it is now and I had Mr. De Figueiredo, the cashier, have him sign the note for the corporation—have the corporation give a note for the \$30,000 and take care of the assignment for that amount, for \$38,000. He offered this paper, said he was going to make an assignment of this. He said that the Company required \$30,000 and that they offered this document, this notice from the Board of Public Works for \$38,000, as security for \$30,000 and the Company to make an assignment for that amount. Mr. Emille presented those papers to me at that same time—the papers introduced in evidence as defendant Portuguese-American Bank's Exhibits 1, 2 and 3. The loan of \$30,000 and the presentation of these papers to me took place at the same time. They were one transaction. I saw the note that was given on that occasion. The note that has just been introduced in evidence is the note that was given on that occasion,—at the same time, before the money was delivered. I saw Mr. Emille on December 7th at the Bank. On that occasion he wanted \$5,000 more on that same assignment that he had made the day previous, because he needed money to pay the labor, and [262] it would be quite an accommodation to the Metropolis Construction Co. to let him have \$5,000 as he wanted to pay off the labor. Regarding security, he said that we had that security of \$38,000, and there was only \$30,000 that we had allowed on that assignment.

(Testimony of M. T. Freitas.)

of \$38,000. Then I told Mr. De Figueiredo to let him have the sum of \$5,000 on that same assignment, and take a new note, a second note. I have seen that note lots of times. That note of \$5,000 dated December 7, which was read in evidence is the note that was given to me on that occasion—given to the Bank—to the cashier. About December 9th or 10th I requested you (referring to James B. Feehan, counsel for defendant Bank) to represent the Bank in reference to the Bank's notes against the Metropolis Construction Co. and this assignment—to take charge of the legal part of the collection of those notes. I authorized you to do everything that was necessary. You were attorney for the Bank and were to take full charge of those notes and have them paid in to the Bank. You were our attorney during all the year 1910. At the time that these notes were taken, I, as President of the Bank, had received no notice that the Metropolis Construction Co. was involved in any way, or that its credit was impaired and that insolvency or receivership proceedings were contemplated by it or against it—at that time. I had no reason to believe that this assignment would create a preference in favor of this Bank. At that time there was no money due to the Bank. I think this Company had been doing business with the Bank about three or four years. They did a very large business with us; they used to borrow quite often and put up collateral. These two loans of \$30,000 and \$5,000 on December 6th and 7th, 1910, were made in the usual course of [263]

(Testimony of M. T. Freitas.)

the Bank's business. I thought that the reputation of the Metropolis Construction Co., as to its financial condition, on December 6th and December 7th, was A-1. At all times subsequent to December 6th, I have claimed to be the owner and entitled, as president of the Bank, to the possession of the warrant mentioned in that assignment.

Cross-examination.

I think that we have been lending them money for four years, I won't say positively; about that—three or four years. I don't know if it is the same corporation; it used to be a partnership, I think, I am not positive. Mr. Emille was interested and someone else, I have forgotten. That is away back about 1906. That was the time of the earthquake. We made loans right along for two years previous to December 10th. This was the second assignment that we had had. We had had one about a month previous of about \$20,000. I am not positive as to the amount. I know we had the same kind of an assignment. As collateral, they would put up bonds, commercial bonds and other bonds—different kinds of collateral. I am not positive whether or not they gave an assignment by resolution. Our cashier made it. I think about a month or so previous to that, that we had an assignment of \$20,000. But we always had a notice of resolution authorizing the Board of Directors or Mr. Emille to borrow money from the Bank, or else he would not have got it. The copy of that notice was shown to us. I am not positive if we got it now or not. I know I saw it.

(Testimony of M. T. Freitas.)

I don't know as I looked for it. My attorney did not ask me to look for it. We loaned the corporation \$5,000, on, I think, December 7th; I am almost sure it was December 7th; [264] it is a good many months ago. I could not tell you whether or not it was on December 10th, Saturday, three days afterwards, that this corporation went into the State Court and confessed its insolvency. I heard somebody—I could not tell whether it was December 10th or 20th. I remember that it was done; I would not say the date. I knew the date, but I could not tell what date it was. I don't know whether or not I knew it on that date. I was sick in bed. I fell sick in December. I was taken sick, I think, about the 9th or 10th of December. The meeting of the Board of Directors of the Portuguese-American Bank is on the second Saturday of each month. I was there; that was the last time I was there; I was sick for quite a while. I don't know whether or not I knew about it on that day. I did not become anxious about the condition of the Metropolis Construction Co. before that nor immediately after we made that last loan of \$5,000. I never became anxious about it because I considered them A-1 and had no reason to question their solvency at that time. I authorized Mr. Feehan (counsel for the Portuguese-American Bank) to prosecute our claims and to collect the notes when they were due. It could not be on the 9th; on the 9th I didn't know anything about it. It was not on the 10th—the day of the meeting of the Board of Directors that I attended;

(Testimony of M. T. Freitas.)

I don't know what date it was. I did not show him the resolutions passed by the Board of Public Works at the time we let him have this last \$5,000. That was away back. But this resolution of the Board of Public Works; this was on the 6th. That was before he got the \$30,000. He got the \$30,000 on either the 6th or 7th; I could not [265] say positively. At the time he got the money and showed me these resolutions from the Board of Public Works that I have testified to. They were to be paid on the 13th, I believe. I think it was something like that; because the Board of Supervisors would meet on the following Monday. But I had the assignment and we were protected to the extent of our interest. I could not tell you positively whether or not it was the 13th that they were to be paid on; it is so far back; I could not tell you the date. I could not tell exactly when I gave Mr. Feehan his authority; I can't remember.

Redirect Examination.

After the meeting of the directors on December 10th, I remember meeting Mr. Feehan in front of the vault of the Bank and saying something to him about this case—about the testimony taken, but I could not remember now what Mr. Feehan said. I know I was not feeling well and I had to go home, and I think Mr. De Figueiredo was going to place the matters with Mr. Feehan, because as soon as I got through the meeting I had to go home; but I spoke to Mr. Feehan for just a short while. I remember that it was a day at the bank, and I was not feeling very

(Testimony of M. T. Freitas.)

well, and I told Mr. Feehan to see Mr. De Figueiredo. He was the cashier and had the proper authority to instruct Mr. Feehan what to do. I was not in a condition to transact business when I got through with that meeting. I don't know whether or not it was on that day that I was notified that the Metropolis Construction Co. was in difficulties; I don't remember exactly. My condition was so that I had to resign the management of the Bank, because I was very nervous, and have been for years, and I [266] resigned the management of the Bank on that account. I was not competent to take full charge of the management. I think I notified Mr. Feehan that I saw the resolution of the Metropolis Construction Co. authorizing Mr. Emille to borrow money, but I am not positive. I don't know if such resolutions are in the files of the Bank; I don't think they are.

[Testimony of V. L. De Figueiredo, for Defendant.]

V. L. DE FIGUEIREDO, being duly sworn as a witness on behalf of defendant Portuguese-American Bank, a corporation, testified as follows:

Direct Examination

I reside in this City and County. I was born in Portugal. I was cashier and secretary of the Portuguese-American Bank during the year 1910, including December 5th, 6th and 7th, 1910, and have held those offices at all times since then. I hold them now. I know Messrs. Emille and Strong, who appeared here, as officers of the Metropolis Construction Co. I saw Mr. Chris Emille and Mr. Strong on December 5th, 1910. They came up to the Bank to bor-

(Testimony of V. L. De Figueiredo.)

row \$30,000 and offered as security an order on the treasurer of the City and County of San Francisco for warrants amounting to \$38,100.16, or about that. I took the matter up with the president that day, and this assignment that was given—that they were offering to us—had not been accepted by the Auditor, so that I told them to have the Auditor accept it first, before we would deliver this money. On the following day then they came in with the order already accepted by the Auditor and we gave them the \$30,000, and got their note for it. [267]

(Counsel for defendant Portuguese-American Bank shows witness an order on the Auditor, dated December 5, 1910.)

I have seen that before; I saw it on December 5th and December 6th. I saw it at the Bank. Mr. Emille brought it in. That is the order that I said I wanted to have accepted by the Auditor, so it would be some sort of collateral for the note—for the \$30,000. Otherwise, without this acceptance, we would not consider it as collateral. There were other papers shown me about that time. There was a copy of the resolutions, of three resolutions passed by the Board of Public Works. Those are the resolutions that have already been introduced in evidence. They were attached to this assignment when it was delivered to the Bank on December 6th. Mr. Emille stated that this paper—the order on the Auditor—was a complete assignment of the full amount of the three warrants—the warrants that are described in those resolutions, that is, the moneys

(Testimony of V. L. De Figueiredo.)

due on them are described in those resolutions.

(The *assignment and not* referred to have been already read in evidence. The resolutions are marked "Defendant Portuguese-American Bank Exhibits 1, 2 and 3.")

At that time, I took a note for \$30,000 from the Metropolis Construction Co. The note now shown me, of \$30,000, dated December 6th, is the note. This note was given to me at the time this assignment and the resolutions were given—on the second day—on the 6th. They are all under one transaction; in fact, they were all held together at the Bank. This was held for collateral for that note. When I received these papers, I just pinned them together to the note. I gave the Metropolis Construction Co. a credit [268] for \$30,000 right after they signed the note.

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag showing a deposit in the Portuguese-American Bank of San Francisco, on December 6th, 1910, by the Metropolis Construction Co., of \$30,000.)

I saw the tag before; I saw it on the 6th of December, 1910. I made it out myself. The tag was made out at the time I received those papers from the Metropolis Construction Co.—right after the note was signed. This \$30,000 that was placed to the credit of the Metropolis Construction Co. was all paid out in different checks. They were paid on the 6th and on the 7th—part were paid on the 7th. They were all used by the Metropolis Construction Co. On December 7th I saw Mr. Emille again. He came into

(Testimony of V. L. De Figueiredo.)

the Bank on December 7th, having used all this money, and he asked for a further credit of \$5,000, stating that as we had a warrant for \$38,000, we were sufficiently warranted to give them \$5,000 more. So I took the matter up with the President of the Bank and we gave them a credit of \$5,000 more, on the 7th of December, 1910, upon their signing another note for that amount, and using the same order on the Auditor, and the collateral for this extra \$5,000.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note. I received it on December 7th—a note signed by Mr. Emille. In fact, I wrote the note out myself and he signed it.

(The note, signed by the Metropolis Construction Co. by J. A. Baptista, assistant treasurer, by Chris Emille, [289] President, with the corporate seal of the Metropolis Construction Co., has already been read in evidence.)

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag, showing a deposit in the Portuguese-American Bank on December 7th, 1910, by the Metropolis Construction Co., of \$5,000.)

That was made out by the receiving teller, Mr. Joseph. The \$5,000 that I loaned the Metropolis Construction Co. was also paid out on checks. It was placed to their credit. This shows that it was placed to their credit. That was all drawn out by checks by the Metropolis Construction Company.

(Testimony of V. L. De Figueiredo.)

To the best of my recollection, the Metropolis Construction Company, as a corporation, had been doing business with our Bank since November, 1908—November or December of 1908. I am not positive. I could tell by a memorandum here. (After referring.) —1908. I could not tell right off what was the volume of business during the year 1910, of the Metropolis Construction Co. with our Bank. I have got some memorandums that I could tell from. Well, they varied from one month to another. Some months they were doing \$50,000 of business and some months over \$100,000. I have a memorandum here showing just how much they were doing each month. In the month of August, 1910, they deposited with us \$40,250; in the month of September, 1910, \$27,-218.88; in the month of October, \$68,424.40; in the month of November, \$184,650.34. In the seven days of December, \$55,729.40. That is actual figures taken from the record. No part of the \$35,000 that was loaned on this assignment on December 6 and December 7 was ever repaid. There is now due from the Metropolis Construction Co. to the Portuguese-American [270] Bank \$35,000, plus interest, which amounts up to date to \$1,714 interest. There was a slight balance to the credit of the Metropolis Construction Co.—\$1.06. The Bank claimed to be the owner of these warrants and the money represented thereby at all times subsequent to December 6, 1910. On December 6th and also on December 7th we had no knowledge or information or belief whatever that the Metropolis Construction Co. was not a

(Testimony of V. L. De Figueiredo.)

solvent corporation. I had no reason to believe that this assignment would effect a preference in favor of our Bank as against other creditors. I know the reputation of the Metropolis Construction Co. financially, on the 6th of December; it was good. I was present at a meeting between Mr. Freitas and Mr. Feehan; but I don't recollect whether or not it was on December 9th. I was present at the time that we took that matter up, when we found out by the newspapers that the Company was in trouble. To the best of my recollection, that was on Saturday when I found it out, which was on the 9th, I think. I requested you to take action with regard to this matter. I don't know whether or not Mr. Freitas did, but I know I requested you. I requested you to do all that was for the interest of the Bank, all that was necessary for the interest of the Bank, to collect those notes. With regard to the assignment, I requested you to advise the auditor, and I don't remember who else, but the Board of Supervisors, I think, and the Board of Public Works, that we were the owners of such warrants. The only information I got at that time was the Metropolis Construction Co. was in trouble was received from the newspapers, on the 9th. Those loans were made in the regular [271] course of business at our Bank. These notes that were used are on the regular forms that we have at the Bank. Mr. Joseph Baptista left the employ of the Portuguese-American Bank on the last day of October, 1910. After that date, he had no official position or employment whatever with the Portu-

(Testimony of V. L. De Figueiredo.)

guese Bank. He never received any pay from the Bank after that. Mr. Baptista presented his resignation to the Board of Directors at the meeting of September 10. The resignation was accepted at that very meeting. I heard Mr. Freitas testify that he saw a resolution of the Metropolis Construction Co. in relation to Mr. Emille. There is no such resolution at the bank. We have no such resolution on file. If such a resolution were on file, it would be in my possession. There is no such resolution at the bank. I never heard until to-day that Mr. Freitas saw such a resolution.

Cross-examination.

When Mr. Emille came there on December 5th, Mr. Strong was right there with Mr. Emille. Mr. Emille did all the talking with me, and as I have related, there was talk about a loan of \$30,000 and the collateral for it. I wanted the collateral—this order on the City Auditor which has been introduced in evidence and which I have identified—accepted by the Auditor before I regarded it as sufficient upon which to make them a loan. And Mr. Emille in some way he got this stamp on from the Auditor's office—"Received Auditor's Office December 6, 1910"—and brought it back to me, and thereupon they gave us a note for \$30,000. I had some talk with the president of the bank about that—just us three—Mr. Emille, and the president [272] and myself. We had made previous loans under similar circumstances. On the 16th of November, we made a loan in the same manner. I had talked with nobody about

(Testimony of V. L. De Figueiredo.)

that first loan and the kind of security we were to receive except with the president and Mr. Emille. The president, Mr. Emille and I, on behalf of the company, arranged the loan.

I have lived in San Francisco about nineteen years. I am a citizen of the United States and of San Francisco, and a voter here. I am familiar with the manner in which the government of the City is carried on. At the time we loaned the money on those warrants, I thought they had been passed upon on that Monday, on the 5th, by the Board of Supervisors. I knew that the resolutions that were handed me were of the Board of Public Works, but I thought they were approved that day by the Supervisors. I did not make any investigation to find out until afterward, I guess. As a matter of fact, I don't think the approval of the supervisors is necessary. I knew that the warrant had to be approved by the Board of Supervisors before it could be paid. I hadn't had any trouble before that. We had got our money before that and had had no trouble. I anticipated that this thing would go right through; as a matter of fact, it was on its way then; that was my idea. I had no other paper on this particular loan from the Metropolis Construction Co. outside of the note and this assignment; I consider the resolutions and the assignment all one. I thought that was all one transaction. They were all pinned together. With regard to this loan, no one connected with the Metropolis Construction Co. had any dealings with anybody in the Bank except myself and the president, Mr.

(Testimony of John B. Lewis.)

Freitas. I don't [273] remember any more of the case.

[Testimony of John B. Lewis, for Complainant.]

JOHN B. LEWIS, being duly sworn as a witness on behalf of complainant, testified as follows:

Direct Examination.

I am Deputy in the Auditor's office of the City and County of San Francisco. I have occupied that position for about six years. As such Deputy Auditor, I am familiar with the general routine of the office. As to the general course of procedure with reference to demands or warrants after they arrive at the Auditor's office, up to the time they get back again from the Treasurer, they are placed within the proper book; they are registered and they are audited, if there is no objection to them, and passed out to the party who is entitled to the warrant. It goes to the treasurer's office and is paid there. There the warrant is marked "paid" and is cancelled; marked with a cancellation stamp over it. The person writes his name in the "received payment" place; then it is returned to the Auditor's office, stamped "paid" on the books, on the register, and then it is placed on file, in the filing case.

(Counsel for complainant shows witness three demands, all in favor of the Metropolis Construction Co.; the first, for \$8,400.69, being third payment on sewer contract No. 31 for the Seventh Street sewer; the second for \$6,964.13, for the payment on account of the Fourth and Kentucky Street sewer; and the

(Testimony of John B. Lewis.)-

third for \$10,864.57, being for the third payment on contract No. 36, for the Lower Sunset sewer.)

Those demands were paid November 22, 1910, that is, the first demand—the Seventh Street sewer. That bears a receipt [274] for the money; I see a name there, evidently L. F. Strong. I am not familiar with the signature of L. F. Strong. It is evidently, however, the same signature as appears on the face of the demand. I should think it was the same signature.

Cross-examination.

I was not in the Treasurer's office when these demands were paid; I don't know who received the money on these warrants.

[Testimony of V. L. De Figueiredo, for Defendant (Recalled).]

V. L. DE FIGUEIREDO, recalled as a witness on behalf of Portuguese-American Bank, defendant, being duly sworn, testified as follows:

During the month of November, 1910, our Bank made a loan of about \$20,000 to the Metropolis Construction Co. and took, as security, an assignment of certain moneys due the Metropolis Construction Co. from the City and County of San Francisco for the third progress payments on certain contracts then being carried out by the Metropolis Construction Co., for the City and County of San Francisco. We received the repayment of the amount of that loan on the 22d day of November, 1910, the amount of \$45,526.14, being the amount of the warrants for that particular payment. As to the amounts of the war-

(Testimony of V. L. De Figueiredo.)

warrants that were assigned to the Bank as security for the loan I have just testified to, I don't remember the amount of each warrant, but the total aggregates \$45,526.14. I don't remember the amount of the warrants that were assigned to the bank.

(Counsel for defendant Portuguese-American Bank shows witness a paper showing supposed amount.) [275]

That refreshes my mind; that is right.

(Counsel for defendant Portuguese-American Bank introduces in evidence an order on Thomas F. Boyle, the Auditor of the City and County of San Francisco, dated November 19, 1910, marked "Received at the Auditor's office November 15, 1910"; marked "Portuguese-American Bank Exhibit No. 6.")

That order on the Auditor shows the authority of the Portuguese-American Bank to take warrants aggregating about \$29,000. I received that money. That money was a part of the \$45,000 that I testified I received. I went to the auditor's office and made a demand for the warrants, stating that I was the cashier of the Portuguese-American Bank. The auditor didn't know me, and I had some one from the Treasurer's office to identify me. I don't remember who it was, if it was Mr. McDonald himself or someone else in the office; I don't remember just who it was. But I was identified before the auditor and he turned the warrants to me. Mr. Chris Emille and Mr. Strong were with me at the time. Then I took the warrants to the Treasurer and got the

(Testimony of V. L. De Figueiredo.)

money. That money was the whole amount, \$45,-526.14. That includes other warrants also. Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion. The warrants were made out in the name of the Metropolis Construction Co.; and the auditor, the only thing that he had was an order to deliver those orders to us, although our name didn't appear on the warrants, only on the order; therefore Mr. Strong signed them. I received the money and not Mr. Strong. I deposited the money with the Crocker National Bank for the account of our bank, on the very same date, on the 22d. [276]

Cross-examination.

I said the warrants were made out in the name of the Metropolis Construction Co. Mr. Strong was assistant secretary of that Company, and the other gentleman who was with me, Mr. Emille, was president of the company. What I had was this paper that we introduced here. That was the paper that was filed, an order to get the warrants. We all went there and took the money and Mr. Strong, at my suggestion, wrote on the back of the warrants, so that the warrants would not be changed. The paper didn't give me any authority at all, for changing the warrants. The paper gave me authority to receive the money. The paper itself, the demands, were made out in the name of the Metropolis Construction Co.

Redirect Examination.

As to how Mr. Strong happened to be with me that

(Testimony of V. L. De Figueiredo.)

day, Mr. Strong and Mr. Emille came up to the bank in an automobile, because, the amount being a large amount, I could not carry that in my hand; so they came up in an automobile and asked me if they could be of any service to me to carry the money for us; and that is why they went up.

**[Testimony of James B. Feehan, for Defendant
(Recalled).]**

JAMES B. FEEHAN, recalled as a witness for Portuguese-American Bank of San Francisco, being duly sworn testified as follows:

On December 17, 1910, I filed with the Board of Supervisors of this City and County a letter, a copy of which I now offer in evidence.

(Copy of letter dated December 17, 1910, addressed to the Board of Public Works and to the Board of Supervisors of the City and County of San Francisco was introduced in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 5.") [277]

On December 19, 1910, between the hours of 9:30 and 10 o'clock in the morning, I left another copy of that letter with the Secretary of the Board of Public Works, to be given to said Board. On December 19, 1910, about 9 o'clock in the morning, I left another copy of that letter with the auditor of this City and County. On January 4, 1911, I left another copy with the Treasurer of this City and County.

[Testimony of J. L. McCormick, for Complainant.]

J. L. McCORMICK, called as a witness on behalf of complainant, being duly sworn, testified as follows:

I am the Secretary of the Board of Public Works of San Francisco.

The witness produces the contract described in the bill of complaint between the Metropolis Construction Company and the Board of Public Works of San Francisco for the construction of sewers in Fourth and Kentucky Streets, which was admitted in evidence.

The following from the specifications annexed to said contract was read in evidence:

"PAYMENTS.

"In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

"The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be [278] of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City

(Testimony of J. L. McCormick.)

Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

"Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

"Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

It was stipulated between respective counsel that on December 19, 1910, at the hour of 11 o'clock and 5 minutes A. M., a petition was filed in this court praying that the Metropolis Construction Company be adjudicated a bankrupt.

Defendant's Portuguese-American Bank Exhibit No. 1, referred to in the foregoing testimony, is as follows:

**[Defendant Portuguese-American Bank Exhibit
No. 1.]**

Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Com-

pany be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and [279] appurtenances in Kentucky Street and Fourth Street.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 1. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 2, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit
No. 2]**

Resolution No. 8399, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of nineteen thousand, one hundred sixty-seven dollars and twenty cents (\$19,167.20) as fourth progress payment on its contract for the construction of sewers and appurtenances in Seventh Street, from Howard to Hubbell Streets.

BOARD OF PUBLIC WORKS.

258 *Paul I. Welles and John Daniel vs.*

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank [280] Exhibit No. 2. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 3, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit
No. 3.]**

Resolution No 8400, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of twelve thousand, one hundred seventy three dollars and seventeen cents (\$12,173.17) as fourth progress payment on its contract for the construction of sewers and appurtenances in the Lower Sunset District.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

(Seal of Board of Public Works.)

Passed.

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 3. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit

No. 4, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit
No. 4.]**

On motion duly seconded, it was unanimously resolved as follows:

That Chris Emille be, and he is hereby appointed the General Manager of the Metropolis Construction Company, and that as such General Manager he shall have full and exclusive [281] charge and management of the conduct of the affairs of this Corporation. That as such General Manager he shall have full power and authority to compromise and adjust lawsuits, pay obligations, borrow money, to hire and discharge such employees as may be necessary from time to time, to carry on the work and affairs of this Corporation; he shall also be empowered to fix the wages and salaries of such employees and, from time to time, to pay the same out of the funds of this Corporation; he shall also be empowered to purchase such supplies, merchandise, horses, machinery, equipment and other personal property as may be necessary in his judgment, from time to time, to carry on the affairs, work and contracts of this corporation, and at such price or prices as his judgment may dictate. He shall also be empowered to do and perform such other acts and things as may be necessary from time to time to carry on and conduct the affairs of this corporation.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 4 for Identification. August 18th, 1911. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 5, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit
No. 5.]**

"San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works
and to the Board of Supervisors of the City and
County of San Francisco:

Gentlemen: You are hereby notified that the Metropolis Construction Company has assigned for value to the Portuguese-American [282] Bank of San Francisco, the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract, dated Jan. 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Cons. Co. and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said city and county, and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said City and County and dated June 22nd, 1910, and being for

construction sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions of the Board of Public Works, authorizing said fourth progressive payments.

Yours very truly,

PORTUGUESE-AMERICAN BANK OF
S. F.

JAMES B. FEEHAN,
Attorney."

(Endorsed:) Filed in *Supervisors* 70 Eddy
St. Dec. 17, 1910. John H. Ryan, Acting Clerk.
[283] Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 5. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 6, referred to in the foregoing testimony, is in words and figures as follows, to wit:

**[Defendant Portuguese-American Bank Exhibit
No. 6.]**

"San Francisco, Cal., November 19th, 1910.
Thomas F. Boyle, Esq., Auditor of the City and
County of San Francisco:

Dear Sir:—You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against said City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st: Warrant for the sum of \$6,964.13, being third progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers; the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$10,864.57, being third progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$4,182.00, being 7th progressive payment under contract between the undersigned and said City and County and dated January 10th, 1903 for the construction of sewer in West Richmond District, and being [284] under bond issue of 1903.

4th: Warrant for the sum of \$8,400.69, being third progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

**METROPOLIS CONSTRUCTION COM-
PANY.**

(Seal of Metropolis Construction Co., Inc.)

By **CHRIS EMILLE,**

President.

By **L. F. STRONG,**

Asst. Secretary."

Received Auditor's Office Nov. 15, 1910.

THOS. F. BOYLE,

Auditor,

By Ed. Ingwersen,

Deputy.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 6. A. B. Kreft, Referee.

The foregoing constitutes the testimony taken prior to October 14, 1911, and upon which the report of the Referee and Examiner of October 14, 1911, is based.

The proceedings and testimony following took place on January 9th and 17th, 1912, pursuant to the order of reference made on December 26th, 1911.
[285]

Mr. FROST.—The Court will please notice that although notice has been duly given, no appearance has been made on behalf of Auditor Boyle. Simply for the sake of getting the record straight, that matter ought to be noted. Now, I hold in my hand here a report of the referee in this case, the case of Paul I. Welles against John Daniel, filed October 14, 1911, the original report, which I offer in evidence.

Mr. HEGGERTY.—No objection.

Mr. FROST.—I ask that that report be considered as read. It is agreed that it need not be incorporated into the evidence. I offer in evidence a memorandum opinion by Judge De Haven, dated and filed December 12, 1911, in this case, and ask that it be considered read, also that it need not be incorporated into the

transcript, being in the files of the court. Any objection?

Mr. HEGGERTY.—No objection.

Mr. FROST.—The same offer is made with reference to the order made December 13, 1911, by the District Court, in this matter, filed December 13, 1911, entitled "Order Approving Report of Referee Granting Injunction, etc.," and ask that this be considered read and not incorporated in the transcript by the stenographer. Complainant rests.

Mr. HEGGERTY.—Subject, of course, if the Court please, to our former objections in which we excepted to the jurisdiction of the Court and stated that we were not appearing and consenting to this action or to this proceeding, we offer in evidence the following portion of the specifications of the contract, the original of which is attached to the bill of complaint, and the original contract, together with the sub-contract being attached [286] to the original bill of complaint in this action, and the specifications being attached to the claim of Mr. Welles in the claim in the bankruptcy matter which is an exhibit in this case. We offer the specifications of the original contract for which specifications are attached as an exhibit to the claim of Mr. Welles, the complainant, in this action, heretofore filed and now on file in this bankruptcy proceedings No. 6827 in bankruptcy, being the bankruptcy of the Metropolis Construction Co., a corporation.

Mr. FROST.—Attached to the claim of Paul I. Welles in the matter of the Metropolis Construction Co., a bankrupt, No. 6827, are the specifications which

have been admitted in evidence with that claim in this case as being the specifications annexed to the original contract of the Metropolis Construction Co. with the City, involved in this case. I understand counsel wants to offer those specifications or some part thereof. What part do you wish to offer?

Mr. HEGGERTY.—The portion of the specifications under the heading "Subcontract" starting with "Sub-contractor"; the sub-heading "Sub-contractor." We offer in evidence the following portion of the specifications described by Mr. Frost commencing with the word "Sub-contract" in the left-hand margin down to and including the words "Contractor's Foreman" in the left-hand margin.

Mr. FROST.—That is objected to on the ground, if your Honor please, that all the issues in this case were found upon the former hearing, and that the findings of fact completely cover all the findings upon all the issues raised by the pleadings; that those findings are conclusive and that unless new issues appear now, that no testimony can be received. [287] That was one of the things that was gone into on the former hearing.

The REFEREE.—What is the purpose of this particular offer?

Mr. HEGGERTY.—We object to being bound or having the referee bound or foreclosed as requested and suggested by Mr. Frost, attorney for complainant, by the report of the referee and by the memorandum opinion to the order introduced in evidence here in this proceeding, the same not being *res adjudicata* or a bar or any other sense or in any respect

to the introduction upon this proceeding or upon this reference of all relevant material and competent evidence within the issues in this case; furthermore, that that report was not a report and is not an adjudication, nor is the order of Court an adjudication upon any matter of fact or thing whatsoever involved in or to be proved, heard, determined and reported, by the referee in pursuance of the order of reference in this proceeding last made, and that your Honor, on the last order of Reference upon which this hearing is taking place, is in duty bound to hear all relevant matter and competent evidence offered by either party or any party to this action, and to report the same in pursuance of the order of reference to the Honorable District Court, 1st Division, in which this cause is pending.

Mr. FROST.—(After argument.) Without waiving my objections, I will make this stipulation that all of the specifications annexed to the contract of the Metropolis Construction Co., with the City and County of San Francisco, and the contract itself, shall be considered in evidence in this cause. Now, that contract is an exhibit with the bill of complaint in this case, and the specifications are annexed to the claim of Mr. Welles in the matter of the Metropolis Construction Co., No. 6827 which is also an exhibit in this case. It is agreed that those specifications, in part or in whole, [288] may be referred to by counsel on argument in this case, and that they may be admitted in evidence, but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to; and that

stipulation is made with the understanding that the objection of complainant to the taking of further testimony is not waived. The stipulation is also made subject to the same reservation that all of the testimony taken upon the former hearing may be considered as evidence upon this hearing as having been heard and read, together with all exhibits introduced upon the former hearing, with the same force and effect as if repeated here, subject to the objection of complainant that this court has not now the right to take further testimony upon that issue.

The REFEREE.—So that I may understand you, the effect of those stipulations is that the evidence may be used in this proceeding, but it is not to be used to change the findings of fact as made?

Mr. FROST.—Yes.

Mr. HEGGERTY.—The same objections and exceptions as appear in the original testimony will be considered as having been taken and made.

Mr. FROST.—Exactly. It is the intention of the stipulations to cover the ground, and if it is not covered, we will cover it.

The REFEREE.—Counsel for the Portuguese-American Bank may introduce such further evidence upon the issues raised by answer to the bill. All the testimony taken on the former hearing is in evidence, together with the exhibits thereon.

Mr HEGGERTY.—As I understand the stipulation, your Honor, it is that all the exhibits, whatever they may be, referred to in the report made by your Honor, or that were introduced by the parties at the last reference, or that appear attached to the [289]

pleadings, either the complaint or the answers, of all the parties or any of the parties, and to the answers to the order to show cause, and the claim exhibits attached to it by Mr. Welles, the complainant, are admitted to have been offered, and are admitted in evidence, subject to the objections of Mr. Frost that the report of the referee heretofore made and confirmed by the Court, and the order of the Court based thereon, prohibit and exclude this evidence or any other evidence upon this hearing. Is that correct?

Mr. FROST.—Yes, that is the situation as I understand it. I take it that there will be nothing new, nothing that I don't know anything about, brought in under that stipulation; but all the evidence that was taken on that former hearing, subject to my objection can come in; and "all evidence" means proceedings, stipulations, exhibits, testimony and the whole record.

Mr. HEGGERTY.—We offer in evidence the following portion of the General Provisions above referred to:

"SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for

subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together [290] with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."

Mr. HEGGERTY.—Mr. Frost is willing to stipulate, as I understand it, that the Portuguese-American Bank, one of the defendants in this action, at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco?

Mr. FROST.—Yes.

Mr. HEGGERTY.—And that the charter of the

City and County of San Francisco as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action, desires to refer to and use, may be referred to and used as evidence? [291]

Mr. FROST.—Either by incorporation into the transcript, or later on, in argument to the Court.

Mr. HEGGERTY.—We desire to have incorporated into the record this matter which is found in the answer of the Portuguese-American Bank of San Francisco:

“MATTERS UNDER CONTROL OF THE BOARD.

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

DRAINAGE.

2. Of all sewers, drains and cesspools, and of the work pertaining thereto, or to the drainage of the City and County.

CONDUITS; GARBAGE AND SEWAGE; SEWERAGE AND DRAINAGE SYSTEM.

7. Of any and all wires and conduits, the collection and construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9, Art. VI, Chap. I.

ACCEPTANCE OF WORK.

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works.

. . . . When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec. 22, Art. VI, Chap. I."

Mr. HEGGERTY.—Will you admit that the assignment of the sub-contract by the Metropolis Construction Co. to Mr. Welles, the complainant in this action, was not consented to by the Board of Public Works? [292]

Mr. FROST.—I will admit this, that there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as a sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, "Paul I. Welles" as the sub-contractor on the job.

Mr. HEGGERTY.—That is the case for the defendant.

Mr. FROST.—It will be admitted that the United Railroads has filed a claim in these bankruptcy proceedings January 4th, 1912; "these bankruptcy proceedings" meaning those of the Metropolis Construction Co., No. 6827.

(Testimony closed; case submitted on briefs to be filed.)

The foregoing condensed statement of said evi-

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dence is hereby proposed as a statement to be included in the record for use on appeal herein, and appellants pray that the same be settled and allowed.

Dated February 20, 1913.

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. ATKINS,
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and
Appellant. [293]

C. A. S. FROST,
Attorney for Paul I. Welles, Complainant and
Appellant.

Approved _____, 1913.

_____,
Judge.

[Stipulation Approving Engrossed Statement of Proceedings and Testimony.]

The foregoing engrossed statement of proceedings and testimony is approved and may be settled and allowed by the Court.

**KNIGHT & HEGGERTY,
JAMES B. FEEHAN,**

Attorneys for Portuguese-American Bank of San Francisco, a Corporation, Defendant and Appellee.

**A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,**

Attorneys for John Daniel, Trustee, Defendant and Appellant.

C. A. S. FROST,
Attorney for Paul I. Welles, Complainant and Appellant.

EDWARD F. MORAN,

Atty. for Defendant Boyle, as Auditor. [294]

[Order Approving and Allowing Engrossed Statement of Proceedings and Testimony.]

The foregoing and engrossed statement of proceedings and testimony is approved and allowed.

FRANK S. DIETRICH,
Judge.

Dated March 15th, 1913.

Receipt of a copy of the within Statement of Pro-

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ceedings and Testimony to be Included in the Record
this 20th day of February, 1913, is admitted.

JAMES B. FEEHAN,
KNIGHT & HEGGERTY,

Attorneys for Defendant Portuguese-American
Bank.

EDWARD F. MORAN,
Attorney for Thomas F. Boyle.

Received Feb. 21, 1913.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Filed Mar. 18, 1913. [295]

**[Certificate of Clerk U. S. District Court to Tran-
script of Record, etc.]**

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the
United States for the Northern District of Cali-
fornia, hereby certify the foregoing and hereunto
annexed two hundred and ninety-five pages, num-
bered from 1 to 295, inclusive, contain a full, true
and correct transcript of the records, as the same
now appear on file and of record in the Clerk's office
of the said District Court, in the cause entitled "Paul
I. Welles, Complainant, vs. John Daniel, Trustee of
the Estate of Metropolis Construction Company, a
Corporation, Bankrupt, Portuguese-American Bank
of San Francisco, a Corporation, and Thomas F.

Boyle, Defendants," and numbered "15,148."

Said transcript has been prepared and made up pursuant to the Praecipis of respective counsel therein, copies of which said Praecipis are incorporated in this Transcript (pages 1 to 8 inclusive), and the personal instructions of C. A. S. Frost, Esquire, Messrs. Knight and Heggerty, and James B. Feehan, Esquire, Attorneys for Appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal is the sum of One Hundred Fifty-seven Dollars and Seventy cents (\$157.70), and that the same has been paid to me in full as follows: \$154.25, by John Daniel, Defendant and Appellant, and \$2.45, by the Portuguese-American [296] Bank, etc., Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of May, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [297]

[Title of Court and Cause.]

Citation [on Appeal—Original].

To Portuguese-American Bank of San Francisco, a Corporation, Defendant, to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul

I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the said District on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord nineteen hundred and thirteen and of the Independence of the United States of America the one hundred and thirty-seventh.

WM. C. VAN FLEET,

Judge.

RETURN ON SERVICE OF WRIT.

United States of America,

Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a certified copy thereof with V. L. de Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San

Francisco, in said District, on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Elmo Warner,
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle, by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,
U. S. Marshal.

By _____,
Deputy.

Filed Feb. 10, 1913.

[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Transcript of Record. Upon Appeals from the United States Dis-

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trict Court for the Northern District of California,
First Division.

Filed May 12, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Title of Court and Cause.]

**Order Enlarging Time [Thirty Days] to File Record
and Docket Cause.**

On motion of counsel for appellants, it is **OR-
DERED** that appellants have thirty days' further
time within which to file the record and docket the
case, pursuant to Rule Sixteen of the above-entitled
court.

WM. W. MORROW,
Judge.

Dated March 7, 1913.

Receipt of a copy of the within Order the 7th day
of March, 1913, is acknowledged.

**KNIGHT & HEGGERTY and
JAS. B. FEEHAN,**

Attorneys for Portuguese-American Bank of San
Francisco, Defendant and Appellee.

EDWARD F. MORAN,
Attorney for Thos. F. Boyle, Defendant and Ap-
pellee.

Filed Mar. 7, 1913.

[Title of Court and Cause.]

**Order Enlarging Time [to May 7, 1913] to File
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have thirty (30) days' further time within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court, to wit, thirty days from and after April 7th, 1913.

WM. C. VAN FLEET,
Judge.

Dated April 5th, 1913.

Time extended thirty days by order March 7, 1913.

Filed Apr. 5, 1913.

[Title of Court and Cause.]

**Order Enlarging Time to [May 12, 1913] to File
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have to and including Monday, May 12th, 1913, within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court.

Dated May 7th, 1913.

WM. C. VAN FLEET,
Judge.

The foregoing extension of time may be granted.

KNIGHT & HEGGERTY,
JAMES B. FEEHAN,
Attorneys for Respondent.

Filed May 7, 1913.

Refiled May 12, 1913.

[Title of Court and Cause.]

Stipulation Concerning Printing of the Record.

To the Clerk of the Above-entitled Court:

In printing the record you will not print the following:

1. All titles of court and cause, after the first. Insert in lieu of each, the words "Title of Court and Cause," except the entire caption or preamble and title of minute order of December 12, 1911, to be set out in full.

2. Verifications. In lieu thereof print the words "duly verified," with date of verification.

3. Endorsements, except the date of filing.

Dated May 12, 1913.

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. MAIKINS,
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant
and Appellant.

C. A. S. FROST,
Attorney for Paul I. Welles.
JAMES B. FEEHAN,
CHARLES J. HEGGERTY,

Attorneys for Portuguese-American Bank of San
Francisco, a Corporation, Defendant and Ap-
pellee.

Filed May 14, 1913.